SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1235

REESE HUBBARD AND LAS VEGAS HACIENDA, INC.,
Petitioners,

vs.

DONNA M. KIEFEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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DONNA M. KIEFEL,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Reese Hubbard and Las Vegas Hacienda, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in case 15933, 15976 and 16210. (Consolidated)*

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court (A. 35-41) is reported in 39 F. R. D. 592-596 and is printed in Appendix B, *infra,* pp. A. 10-17. The opinion of the United States Court of Appeals for the Seventh Circuit (R. 1-8)

*Petitioner, Reese Hubbard, was the trial attorney for petitioner, Las Vegas Hacienda, Inc., defendant in a personal injury action.

Pursuant to Rule 23 (5) the separate but related contentions of the two petitioners are combined in a single petition for the convenience of the Court.

printed in Appendix B, hereto, *infra*, pp. A. 18-34, is reported in 404 F. 2d 1163-1172.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 15, 1968. (R. 9) Rehearing timely sought was denied on January 6, 1969. (R. 13) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

(As to Trial Lawyer, Reese Hubbard.)

1. Will not the independence of the bar be irreparably injured if, as here, months after a civil trial, a trial lawyer may be punished summarily "for objectionable trial strategy" by the trial judge through an award of "costs," including attorney's fees, which was entered against the attorney

   (a) without giving him any advance notice of the charges to be defended,

   (b) without permitting him any opportunity to confront and cross-examine his accusers,

   (c) without allowing him any opportunity to present evidence corroborative of his factual statements made during trial, and

   (d) without making specific findings of fact and conclusions of law which would determine the issues on appeal?

2. May the strict limitations of constitutional due process, of the direct contempt statute, and of the summary contempt rule all be cavalierly swept aside, simply by changing the name of the proceeding from "contempt" to "costs," and by making the resulting award to opposing

counsel, rather than to the government as a "fine"? 18 U. S. C. § 401; F. R. Cr. Proc. 42(a).

3. Was 28 U. S. C., § 1927 (*infra,* p. A. 8) enacted to enable a federal court to ignore the foregoing limits on its power to punish a trial lawyer?

4. In the exercise of this Court's supervisory power over lower federal courts to permit the "effective administration" of justice, should not this Court review this extraordinary expansion of power over the trial lawyer's representation of his client?

5. Have the members of this Court and the commentators been wrong in thinking that "an independent judiciary and *a vigorous independent bar* are *both* indispensable parts of our system of justice," *Re McConnell,* 370 U. S. 230, 236, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962), and that "... the legal process conducted by *independent judges* will be incapable of resisting ... tyranny unless the judges are aided *in the course of trials* ... by *equally independent lawyers* ..."? Rostow, The Lawyer and His Client, 48 A. B. A. J. 25, 28 (1962).

6. May a district judge and a Court of Appeals ignore a century of precedent and tradition that power to punish a lawyer must derive from statute or rule? See *Nye* v. *United States,* 313 U. S. 33, 47, 85 L. Ed. 1180 (1941).

Is that century of legal tradition, born of the impeachment of Judge Peck and the enactment of the predecessor of the present contempt statute, suddenly to be ended, by the opinion below?

7. Did not both courts below err in receiving statements from opinions in other cases, to which Reese Hubbard was not a party, as conclusive evidence of "objectionable trial strategy" in this case?

8. Is the conclusion of "objectionable trial strategy" in this case sustained by evidence?

9. Does "costs" include expert witnes fees?

10. After reducing a "costs" judgment against a trial lawyer from $8,171.56 to $1,741.20, by eliminating the trial court's award of attorney's fees, may the Court of Appeals further punish the trial lawyer for "objectionable trial strategy," or for appealing the "costs" judgment, by awarding opposing counsel their fees on appeal?

11. Was it not error for the Court of Appeals to sustain the "costs" judgment punishing a trial lawyer (not an ordinary civil judgment) by utilizing charges made against the lawyer on the second trial of the injury action, which took place long after the "costs" judgment had been entered and appealed from? Is this not the same type of change of theory at the review level which was held to be a "denial of due process," in *Gregory* v. *City of Chicago*, 37 U. S. Law Week 4213 (March 19, 1969)?

12. Was the lawyer's request for a trial by jury improperly refused?

13. Was the lawyer's request for trial by a different judge improperly refused?

QUESTIONS PRESENTED.

(As to the defendant-client, Las Vegas Hacienda, Inc.)

1. Was not the use, by both Courts below, of matter dehors the record, from opinions involving earlier clients of Reese Hubbard, who are not in privity with this defendant, both improper and highly prejudicial?

2. Ought all the clients of a lawyer, over his entire career, to be regarded as in privity with each other?

3. May a District Court and a Court of Appeals overrule the time-honored tradition, sanctioned by this Court, that judgments bind only the parties thereto and persons in privity with them? *e.g.*, *Hansberry* v. *Lee*, 311 U. S. 32, 40-41, 85 L. Ed. 22, 26, 61 S. Ct. 115, 132 A. L. R. 741.

4. Does not the receipt of the statements from other cases show that defendant fell the victim of an attitude of judicial hostility toward its lawyer, which had its origins outside this lawsuit?

5. Is not that attitude most forcefully shown by the following statement of the trial court, which is quoted by the Court of Appeals as an adequate basis for Judge Robson to give plaintiff a new trial? (See pp. A. 16-17, 21, *infra.*)

> "The court is convinced that because of the unprofessional tactics of Reese Hubbard, counsel for defendant, the plaintiff did not have a fair trial. Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead, he seeks to use his experience to assert and apply every sly trick and strategem to win his case. He does this with the hope that he can stay within the bounds of professional ethics. In this instance, he has far overstepped the bounds. This court finds that his trial tactics were such that the jury might or could have been influenced by his unfair actions and as a result found for the defendant."

6. Does not the record disclose that the courts below were so influenced by past criticisms of defendant's lawyer that defendant did not receive a fair trial or appeal?

(First Trial.)

7. Was not the grant of a new trial a denial of Hacienda's rights under the Seventh Amendment to a trial by jury? Will not that Amendment barring reexamination of facts found by a jury, be reduced to a nullity, if as here, a court may grant a new trial simply because it dislikes either the verdict, or the lawyer?

8. If an opening statement has not been objected to by the court or opposing counsel at the time, may that opening

statement later be made the basis for an award of a new trial?

9. Is failure to present evidence described in the opening statement error, if it results from the court's action in improperly sustaining objections by opposing counsel to that class of evidence?

10. If plaintiff's counsel wished to bar Hubbard in his opening statement from mentioning a witness's [Tracy's] evidence, ought he not to have moved for a protective order since her name was on the pretrial list and he had recently taken her statement? Failing that, ought he not to have objected promptly to the opening statement rather than allow the case to be tried for two weeks?

11. In holding there was a duty to file the uncertified deposition of Sharon Hamlin, rather than return it to the court reporter for certification, have not the courts below completely misread F. R. C. P. 30?

12. May a lawyer, after verdict, claim prejudice because of his inability to bring in as a witness a court reporter from across the country on only one day's notice, when he did not request any delay to accommodate the witness?

(Second Trial.)

13. Did not the trial court make prejudicially erroneous rulings of law respecting the witnesses Tracy and Carpenter? Was not their testimony admissible under well-established exceptions to the hearsay rule?

14. May a District Court and a Court of Appeals ignore the law of evidence as it has been stated by this Court and the courts of the State of Illinois? *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285, 36 L. Ed. 706, 12 S. Ct. 909; *Keshner* v. *Keshner,* 376 Ill. 354, 55 N. E. 2d 877; VI Wigmore on Evidence, 3rd Ed. (1940) §§ 1725, 1729, 1730, pp. 79-85, 91, 93-94.

If so, are not Rule 43 (F. R. C. P.) and the *Erie* doctrine nullified? Are such rules to be termed merely matters of "tactical interplay"? (A. 34, *infra.*)

15. Is not the failure of the Court of Appeals even to mention defendant's most important contentions of legal error in the second trial further indication that defendant Hacienda was denied its day in court because of the Court's felt "outrage" at what it called the "history of Hubbard's practice"? (Opinion, *infra,* p. A. 30)

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED.

The following statutory provisions, reprinted in Appendix A, *infra,* pp. 5-8 are involved: 18 U. S. C., § 401 (*infra,* pp. A. 5-6); 28 U. S. C., § 1912 (*infra,* p. A. 6); 28 U. S. C., § 1913 (*infra,* p. A. 6); 28 U. S. C., § 1920 (*infra,* pp. A. 6-7); 28 U. S. C., § 1923 (*infra,* p. A. 7); 28 U. S. C., § 1927 (*infra,* p. A. 8).

Amendments VI, VII (*infra,* pp. A. 8-9) and Amendment V (*infra,* p. A. 9) to the United States Constitution are involved.

Rules 30 (*infra,* pp. A. 1-2), 43 (*infra,* p. A. 2); 52 (*infra,* p. A. 3); 61 (*infra,* pp. A. 3-4) of the Federal Rules of Civil Procedure are involved. Rule 42 (*infra,* p. A. 4) of the Federal Rules of Criminal Procedure is involved. Rule 39 (c, e) of the Federal Rules of Appellate Procedure (*infra,* p. A. 5) is involved.

STATEMENT OF THE CASE.

Donna M. Kiefel was assaulted in her motel room at the Las Vegas Hacienda and sustained personal injuries. She sued the Hacienda for $1,000,000 (A. 3-5).* Her husband

*A.—refers to Appendix in 15933, 15976 [labelled I on cover]; A. II—refers to Appendix in No. 16210 [labelled II]; Add. App.

Carl Kiefel sued for $250,000, claiming loss of consortium (A. 6). The district court had jurisdiction by reason of the diversity of citizenship of the parties.

There were two jury trials in the case. At the beginning of the first trial the husband's claim was withdrawn (A. 18). The jury returned a verdict for defendant Hacienda.

The district court ordered a new trial. Six months later, on motion of plaintiff, the court assessed against the Hacienda and its trial lawyer, Reese Hubbard, "costs" in the amount of $8,171.56, for the benefit of plaintiff's attorneys (A. 139-142). Separate appeals were taken by the Hacienda and Reese Hubbard from the order awarding "costs."

While the appeals were pending the injury case was retried before a different judge and jury. The second jury returned a verdict for Mrs. Kiefel in the amount of $100,000, and the Hacienda appealed. (A. II 19)

The appeals were consolidated. The Court of Appeals reversed the "costs" judgment against the Hacienda, reversed it in part ($6,430.36) and affirmed it in part ($1,741.20) against Reese Hubbard, the lawyer, and affirmed the order granting a new trial and the judgment for $100,000 entered on the verdict in the second trial. (*Infra*, pp. A. 31-32)

The Court of Appeals also remanded the case to the district court "for assessment of costs against Reese Hubbard for the expenses of printing plaintiff-appellee's 54-page brief and the additional appendix in No. 15976 and a sum no greater than one-third (1/3) the plaintiff-appellee's attorneys' fee incurred in the appeal of cases Nos. 15933, 15976 and 16210." (*Infra*, p. A. 32)

—refers to [blue] Appendix filed by plaintiff; Rep. App.—to the Reply Appendix.

There are two certifications of record from the Court of Appeals, Vol. I containing pages R. 1-R. 14, and Vol. II containing pages R. 15-R. 32.

The first trial judge described the three critical questions in the injury case as follows (A. 35-36) (*Infra*, p. A. 11):

(1) Who inflicted the injuries, her husband or an intruder?

(2) If an intruder, did he gain entrance through plaintiff's contributory negligence by virtue of an unlatched door, or plaintiff's negligence due to intoxication, or other circumstance?

(3) Did the assault proximately result from defendant's negligence in failing to provide an adequate lock on the door or in not maintaining sufficient security guard in the corridor? (A. 35-36)

In the same memorandum, the trial court said that it was allowing plaintiff's motion for a new trial because it felt, "the jury might or could have been influenced" by "objectionable trial strategy" of Hubbard in the following three particulars (A. 35, 36, 38-41) (*Infra*, pp. A. 11, 14, 15-17):

(1) Insinuating in his opening statement and in cross-examination of Carl Kiefel that the plaintiff and her husband had an altercation, which defendant would prove by the husband's statement to the telephone operator, Dixie Tracy, and then failing to make the promised proof.

(2) Failure to file the uncertified deposition of Sharon Hamlin.

(3) Precluding the court appearance at the Chicago trial of Stella Butterfield, the Las Vegas court reporter, who took the Hamlin deposition.

1. What the Record Shows on Charge 1.

Sometime before 5:20 a.m., March 1, 1962, someone entered plaintiff's room and attempted to murder her by striking her on the head with a bottle of champagne, fracturing her skull. (A. 290-292) The bottle of champagne

was one of four which plaintiff and her husband had sitting on a table. (A. 600; A. II 809)

During the evening and morning of February 28-March 1, 1962 the Kiefels went to shows, after which they returned to the Hacienda and had a drink at the bar. (A. 271) Plaintiff then returned to their room and went to bed. (A. 274) Plaintiff testified that Carl Kiefel decided to stay in the gambling casino. (A. II 220) (At the first trial, Carl Kiefel gave uncorroborated testimony that he played blackjack in the casino until 6:30 a.m. A. 218)

Plaintiff's husband, Carl Kiefel, made several extremely damaging admissions to a maid and telephone operator during the early morning hours of March 1, 1962. To the maid, Willie Lee Carpenter, who admitted him to the room about 7:00 a.m., with her latchkey, he explained that he gave the key to his wife when she returned to the room earlier, that he had then told her to leave the door unlocked, but that when he came back the door was locked. (A. 560; A. II 604)

[Note: while a patient at Sunrise Hospital, plaintiff Donna Kiefel admitted on numerous occasions to various persons, including nurse Sharon Hamlin, that she had left the door unlocked, pursuant to this arrangement with her husband. (A. 601-602; A. II 811; A. 494; A. II 806-807; A. 539, A. II 635, 794, 827; A. 599; A. II 808-809)]

During the hours between 2:00 and 6:15 a.m., Carl Kiefel attempted to make fourteen telephone calls to his room. (A. 86-87) Tracy, the phone operator, asked him why he did not get a key from the desk. He answered: "The chain is on. My wife and I had some words and she put the chain on and I can't get in." (A. 86-87)

Plaintiff's counsel had been advised of the maid's [Carpenter] evidence and the phone operator's [Tracy] evidence in advance of trial. The maid's name was on the pretrial order. Plaintiff's counsel had a copy of her state-

ment. (A. 11) By leave of court the name of Tracy was added to the pretrial memorandum, it being completely understood that plaintiff's counsel would interview the phone operator on his already planned visit to Las Vegas. (A. 12) Ten days before trial plaintiff's counsel took a sworn statement from the telephone operator, which described the calls and Kiefel's admission of the altercation with his wife. (A. 42)

On November 2, 1965, the day of the start of the first trial, Carl Kiefel was dismissed as a party to the lawsuit. (A. 18-23) However, the pretrial order was not amended to delete Tracy and Carpenter as witnesses. Nor was an order sought barring any mention of the admissions in Hubbard's opening statement.

Hubbard thereupon told the jury in his opening statement that "the evidence would show that *the husband told the telephone operator that he and his wife had had a fight and that she wouldn't let him in the room.*" (A. 38-39) (Emphasis by the Court.)

Plaintiff's counsel apparently did not make any objection to the opening statement. Hubbard transported both Carpenter, the maid, and Tracy, the telephone operator, all the way from Las Vegas to testify. (A. 556-561; A. II 609)

Hubbard could not present Tracy's evidence of the husband's declaration, because the trial court had ruled, during Carpenter's testimony, that anything Carl Kiefel had said outside his wife's presence would not be admitted.

> "The Court: To anything that he said the objection is sustained." (A. 558-559)

Further, when Hubbard attempted to question Carl Kiefel about his statement to Tracy that there had been a fight, and that plaintiff had chained him out of the room, the trial court sustained plaintiff's objection. (A. 45)

Though Carl Kiefel had been dismissed as a party, Hubbard believed that Kiefel's declarations were still admis-

sible, under three well-recognized exceptions to the hearsay rule:

A. They showed his state of mind at the critical time. See *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285, 12 S. Ct. 909, 36 L. Ed. 706 (1892); *U. S.* v. *Annunziato* (C. A. 2 1961), 293 F. 2d 373, 376-378; *Keshner* v. *Keshner,* 376 Ill. 354, 55 N. E. 2d 877 (1941); VI Wigmore on Evidence, 3rd Ed. (1940) §§ 1725, 1729, 1730, pp. 79-85, 91, 93-94.

B. Kiefel's declarations were admissible as explanatory of other independently admissible evidence. When Security Officer Prolle entered the room, he told Kiefel not to touch anything, lest he destroy the fingerprints thereon. (A. 603, 613) Immediately, Kiefel grabbed the assault weapon, thereby destroying any fingerprints. (A. II 98) Further, there was evidence that he rendered no assistance to his critically-injured wife, and that he failed to accompany her to the hospital. (A. 45, 301)

Kiefel's declaration to the operator would be explanatory of his reasons for the foregoing conduct. See *U. S.* v. *Annunziato* (1961), 2 Cir., 293 F. 2d 373; *Fitzgerald* v. *Benner,* 219 Ill. 485, 494, 76 N. E. 709 (1906); *Yarborough* v. *Prud. Ins. Co.* (1938), 5 Cir., 99 F. 2d 874, 100 F. 2d 547.

C. Kiefel contracted for the trip and the room for himself and plaintiff. They occupied it jointly. She sued for nonperformance of the contract. Hence, his admissions were admissible against her.

See *Forsyth* v. *Doolittle,* 120 U. S. 73, 74, 30 L. Ed. (1877); *Miller* v. *Mathias,* 145 Ill. App. 465, 466 (1908); *Hayes* v. *Claessens,* 234 N. Y. 230, 137 N. E. 313 (1922); *Ken* v. *Clements,* 148 Pa. Super. 378, 25 A. 2d 734 (1942); *Toler* v. *Bishop,* 84 Ill. App. 278, 280.

All other matters in the opening statement were proved. (A. 257, 539, 561; A. II 241-243, 271-273) Plaintiff herself admitted that "the light from the bathroom shone on his [the attacker's] face." (A. 192)

2. What the Record Shows on Charge 2.

One of the five persons to whom plaintiff admitted she left the door unlocked was student nurse Sharon Harvey Hamlin, who recorded in the hospital notes (A. 539; A. II 635, 794, 827):

> "Patient has remembered how she came to Las Vegas, with whom she came, where she stayed, and she also remembers going to her room the night she was attacked, leaving the door unlocked so that her husband could come in."

By the time of trial Sharon had married, had a baby, and was uncertain as to whether she could come to Chicago to testify. (A. 513-514; A. II 65-66) Hence, her deposition was taken October 22, 1965 in Las Vegas, Nevada, at the office of Singleton, Delanoy & Jemison by Frank Hall, a Chicago lawyer associated with Reese Hubbard. (A. II 30) The reporter was Stella Butterfield. (A. II 30)

Late in October, prior to trial, Mrs. Hamlin signed it in Mrs. Butterfield's presence. Mrs. Butterfield did not certify it, as she had forgotten her seal. (A. 782) She left it with Hamlin. (A. 782)

Hamlin brought it with her uncertified to Chicago on November 4, 1965, two days after the trial started (A. 528, 538), and left it at Reese Hubbard's office. (A. 538)

She then went to her family home in Baltimore, Maryland. (A. 528-529) Twelve days later, on November 16, 1965, she testified in this case. (A. 510-513)

While she was gone, Hubbard had the deposition returned to Las Vegas for certification. (A. 539-540; 541-542)

Reese Hubbard's statements to the court about the whereabouts of the deposition were corroborated by the testimony of Hamlin, as well as by the factual assumption of the plaintiff's counsel's questioning at the second trial. (A. II 552)

Moreover, Hubbard had no duty or right under Rule 30(e, f) to file the uncertified deposition. Indeed, the rules do not contemplate that anyone but the reporter shall have or file the original of the deposition.

It was never clear that Mrs. Hamlin could stay away from Las Vegas long enough to testify. Her child was ill. (A. 539-54) She was away nearly two weeks waiting to testify. (A. 539-540) Rule 30(f), F. R. C. P., required that the deposition be certified and filed by the reporter (Butterfield) if it were to be used by Hubbard.

3. What the Record Shows on Charge 3.

Hamlin finally testified on November 16, 1965, at about the end of the first trial. Jacobson, plaintiff's counsel, thereafter sought to bring Butterfield, the Las Vegas reporter, to Chicago so that she could testify on November 17, 1965 to impeach Hamlin.

The criticism of the trial court that Hubbard "hamstrung the plaintiff's counsel in precluding the appearance of an out-of-town court reporter [Butterfield] to testify," and that he "manipulated matters so that . . . [she] would not be available to appear at this trial . . ." rests solely on an affidavit of plaintiff's counsel, which was contradicted by Butterfield herself.

Jacobson's affidavit, contained in the post trial motion, asserted that he [plaintiff's counsel] had called Butterfield on November 16, 1965 and that she had agreed to come to Chicago the next day (A. 27, 28). At 9:30 p.m., the motion continued, Butterfield called Jacobson, told him she had purchased her ticket, but that William Singleton refused to release her from a deposition commitment. (A. 27-28) At 10:30 p.m., the motion continues, Jacobson made a long distance call to Singleton at his home, asking rescheduling of the deposition, and that Singleton flatly refused." (A. 28.)

Hubbard categorically denied having anything to do with any of the foregoing events. (A. 91)

Hubbard's demand to cross-examine Jacobson and to present evidence corroboration of his denial was refused. (A. 139, 623-632)

Neither Singleton nor Butterfield testified. Butterfield, however, did give a deposition, before retrial of the injury case, in which she denied that Jacobson spoke to her personally (only his "office girl"), denied she had ever purchased a ticket (only checked availability of flights), and denied she had ever agreed to come to Chicago to testify. (A. 665)

All she agreed was to find a substitute reporter for the Singleton deposition. (A. 665) Unable to find another reporter in Las Vegas to take her next day's work, she asked the office of Singleton, Delanoy & Jemison to reschedule the November 17 deposition, and was told "it was a very important case." (A. 665)

It is uncontradicted that Jacobson never contacted Hubbard to ask him to intervene with Singleton. (A. 589)

Nor did plaintiff's counsel move to obtain Butterfield's appearance on November 18, when it became apparent she could not make it on November 17. Under Illinois law such an attempt and motion is an absolute prerequisite to the grant of a new trial because of the absence of a witness. *Pinkstaff* v. *The Pennsylvania R. Co.*, 23 Ill. App. 2d 507, 507-24, 163 N. E. 2d 728 (1959), *affirmed* 20 Ill. 2d 193, 170 N. E. 2d 139 (1961), *cert. den.* 365 U. S. 878, 81 S. Ct. 1029 (1961); *Kendall* v. *Limberg*, 69 Ill. 355, *Clark* v. *Chicago Rys. Co.*, 192 Ill. App. 358, 360 (1915); *Casey* v. *Sawyer Biscuit Co.*, 163 Ill. App. 145 (1911); *Mastin* v. *National Tea Co.*, 278 Ill. App. 60 (1934); *Nehring* v. *Ricker*, 126 Ill. App. 262 (1906).

REASONS FOR GRANTING THE WRIT.

(AS TO HUBBARD, THE LAWYER).

1. Review should be granted because this entire proceeding to punish Hubbard summarily nullifies the statute especially enacted to protect the independence of the bar, 18 U. S. C. § 401, and Rule 42, F. R. Cr. P. (*Infra*, pp. A. 4, A. 5-A. 6)

18 U. S. C. § 401 (the current citation) was enacted, following the impeachment trial of Judge Peck, to restrict the contempt power of courts, so that it would not be used to discipline lawyers. We believe Congress intended to prevent the very thing done in this case.

Plaintiff made certain charges in a motion for a new trial. (A. 26) Hubbard denied these charges. (A. 84) The court refused Hubbard the right to meet and disprove these charges. (A. 623-624) Hubbard made timely demand for a jury trial, and before a different judge. (A. 84, 138) It also was refused. (A. 139)

The reviewing courts, when cases involving lawyers have come to their attention, always mention the historical fact that this statute was passed especially to protect the independence of lawyers in the exercise of their profession. *Cammer* v. *United States*, 350 U. S. 399, 76 S. Ct. 456, 100 L. Ed. 474 (1956); *Re McConnell*, 370 U. S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962), *reversing* 294 F. 2d 310 (C. A. 7, 1961); *DeParcq* v. *U. S. District Court for Southern Iowa*, 235 F. 2d 692 (8th Cir. 1956). The Courts emphasize the public policy reason for restricting the power of contempt by quoting the argument of Congressman Buchanan (350 U. S. 399, 406): *"The public have almost as deep an interest in the independence of the bar as of the bench."* (Emphasis supplied.)

18 U. S. C. § 401 defines the limits of the power of a United States Court to punish for contempt as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> "(2) Misbehavior of any of its officers in their official transactions;
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Referring to the statute quoted above, the third paragraph obviously does not apply in this case. See *United States* v. *De Parcq,* 164 F. 2d 124 (7th Cir., 1947).

The second paragraph also is inapplicable because the United States Supreme Court has held that a lawyer is not an officer of the court within the meaning of this statute. *Cammer* v. *United States,* 350 U. S. 399, 407-408, 76 S. Ct. 456, 100 L. Ed. 474 (1956).

Nor does Hubbard's conduct come within the scope of paragraph one. *Re McConnell,* 370 U. S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962); *United States* v. *Sopher,* 347 F. 2d 415 (7th Cir., 1965). In *Re McConnell* the Supreme Court reversed the contempt conviction of a lawyer who had been fined $100 for persistent interrogation of witnesses on an issue after it had been (erroneously) ruled out of the case by the trial judge. The lawyer stated: "We have a right to ask the questions, and we propose to do so unless some bailiff stops us." This Court said: (370 U. S. 236)

> "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which

blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

"* * * *An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice.* To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the *least possible power adequate to prevent actual obstruction of justice,* and we think that that power did not extend to this case." (Emphasis supplied.)

A reading of the Appendix shows that Hubbard's obedience to the court's rulings was exemplary. In no degree did he approach the behavior of the advocate in the *McConnell* case. In marked contrast to *McConnell,* above, p. 16, Hubbard refrained from calling Dixie Tracy, then available (A. 43), to make an offer of proof such as offended the trial judge in the *McConnell* case, 37[illegible] S. at 232. His deference to the court's ruling on this crucial evidence question was beyond criticism, as well as procedurally correct. Hubbard followed the example of the lawyer in *Bartholow* v. *Davies,* 276 Ill. 505, 514-515, 114 N. E. 1017 (1917), rather than the example of the lawyer in the *McConnell* case.

Nothing said or done by Hubbard would constitute conduct within the power of the court to punish him for contempt. The judgment under review is not a taxation of "costs" as that legal term is universally understood.

If a judgment of this type could be entered against a lawyer, it would be a far greater threat to the independence of the advocate than the penalties attempted to be imposed in the *Cammer* and the *McConnell* cases.

The rights of a court to enter judgment, without a trial, on the verity of its own observations is limited to matters within the contempt statute. It is an immutable principle of Constitutional due process that in all other matters the

court must hear evidence and must grant a jury trial with right of confrontation and cross-examination of witnesses. *Greene* v. *McElroy,* 360 U. S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959); *Willner* v. *Committee on Character & Fitness,* 373 U. S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963); *Nye* v. *United States,* 313 U. S. 33, 61 S. Ct. 810, 85 L. Ed. 1172 (1941); *Holt* v. *Virginia,* 381 U. S. 131, 85 S. Ct. 1375, 14 L. Ed. 2d 290 (1965).

Even in contempt cases the power to initiate summary punishment is lost after trial, so that notice and an evidentiary hearing are required. F. R. C. P. 42(b). *Re Oliver,* 333 U. S. 257, 92 L. Ed. 682, 68 S. Ct. 499; *see Sacher* v. *United States,* 343 U. S. 1, 11, 96 L. Ed. 717, 724, 72 S. Ct. 451 (1952). Summary punishment for contempt, moreover, will not lie in any instance where, as here, "any elements of the offense are not personally observed by the judge, so that he must depend on statements made by others for his knowledge of these elements * * *." *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 695, 68 S. Ct. 499 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925).

In enacting and interpreting 18 U. S. C. § 401, Congress and the Supreme Court were not just protecting the narrow professional interests of lawyers, but they were defending our adversary system, which cannot exist without an independent bar. The universal agreement in our society that the courts can not function without free advocacy finds frequent expression in the speeches and writings of judges and law teachers. We conclude with one statement of the public interest in this regard:

> "It is our common conviction that the legal process, conducted by independent judges, will be incapable of resisting public or private tyranny unless the judges are aided in the course of trials, and in all other aspects of the work of the profession, *by equally independent*

lawyers, who have been schooled to provide a fearless and intransigent inquiry into every relevant circumstance of the problem being dealt with." (Emphasis supplied.) (Rostow, *The Lawyer and His Client,* 48 A. B. A. J. 25, 28 (1962).)

28 U. S. C., § 1927 (*infra,* p. A8) was not enacted to enable a federal court to curtail the independence of the bar by ignoring the limitations of 18 U. S. C., § 401, and F. R. Cr. p. 42 on its power to punish a trial lawyer.

2. Certiorari should be granted because this entire proceeding completely nullifies petitioner's constitutional rights, which may not be cavalierly swept aside by changing the name of the proceeding from "contempt" to "costs."

A. Confrontation and Cross-Examination.

In denying Reese Hubbard the right to confront and cross-examine his accusers, the opinion is in direct conflict with this Court's decisions in *Willner* v. *Committee on Character & Fitness,* 373 U. S. 96, 103, 105, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 229, 231 (1963); *In re Oliver,* 333 U. S. 257, 259, 273, 275, 92 L. Ed. 682, 694, 695 (1948); *Greene* v. *McElroy,* 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959). See also *Berger* v. *Calif.,* 37 U. S. Law Week 3247, 89 S. Ct. 540, 541 (1969); *Barber* v. *Page,* 390 U. S. 719, 721, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255 (1969); *Pointer* v. *Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

In denying Reese Hubbard's right to confront his accusers, the opinion is also in conflict with *Cohn* v. *Kramer,* 136 F. 2d 293, 295 (C. A. 6, 1943); *N. L. R. B.* v. *Whittier Mills,* 134 F. 2d 725, 728 (C. A. 5, 1941); *N. L. R. B.* v. *Rath Packing Co.,* 123 F. 2d 684, 685 (C. A. 5, 1941).

The most serious of the three charges against Reese Hubbard, relied on by Judge Robson, was that Reese Hub-

bard "precluded" an impeachment witness, named Stella Butterfield, from coming to Chicago from Las Vegas on one day's notice to testify. (A. 40-41) Hubbard categorically denied the charge. (A. 91)

No witness appeared and contradicted him. All that supports the Court's conclusion is the affidavit assertion of plaintiff's counsel, Lowell Jacobson, contained in the motion for new trial, that after witness Sharon Hamlin testified on November 16, 1965, Jacobson called reporter Stella Butterfield in Las Vegas to ask her to fly to Chicago the next day and bring her notes and impeach Hamlin, and that Butterfield agreed to this request. (A. 27) At 9:30 p.m., that evening, Jacobson continues, Butterfield called him back and told him she had purchased her ticket, had her hair done, and was ready to come to Chicago, but could not reschedule a deposition at the office of William Singleton, a local attorney. (A. 28) Jacobson says he then called Singleton to ask him to continue the deposition, and was refused. (A. 28)

(Singleton is not connected with the case other than (1) two depositions were taken in his office on October 22, 1965 and (2) Hacienda's insurer in this case is listed in Martindale-Hubbell among the clients of his firm. (A. 40, Rep. A. 10)

Hubbard properly requested the right to confront and cross-examine his accuser, Jacobson. (A. 85)

For the court to infer that Hubbard had caused Singleton to refuse to release Butterfield without permitting Jacobson's cross-examination, was, under the foregoing authorities, reversible error and an unconstitutional deprivation of rights.

The prejudicial character of this error is shown by the fact that when Butterfield was later deposed in the principal case, she denied she had ever agreed with Jacobson to come to Chicago the next day, or that she had purchased a

ticket. In fact, she denied she spoke with Jacobson at all. (A. 665)

When Jacobson's office girl called, Butterfield told her only that she would like to come if she could get a substitute reporter for Singleton's important deposition scheduled the next day. (A. 665) Unsuccessful in that, she asked Singleton's office to reschedule it and was reminded that "it was a very important case." (A. 665)

B. Right to An Evidentiary Hearing.

In denying Reese Hubbard's request for a full evidentiary hearing with advance notice of the charges to be made against him, and an opportunity to rebut them with evidence and with specific findings, the opinion is in direct conflict with *Holt* v. *Virginia*, 381 U. S. 131, 14 L. Ed. 2d 290, 85 S. Ct. 1375 (1965); *In re Oliver*, 333 U. S. 257, 273, 92 L. Ed. 682, 2694 (1948); *In re Raffalo*, 390 U. S. 544, 20 L. Ed. 2d 117 (1968); *In re Murchison*, 349 U. S. 133, 99 L. Ed. 942, 75 S. Ct. 623. See also *Brotherhood of Loc. Fire & Eng.* v. *Bangor & Aroostock R. Co.*, 380 F. 2d 570, 581 (D. C. Cir. 1967).

The cited cases indicate that the fact that a hearing was given on plaintiff's motion for a new trial is not enough to satisfy due process for a number of reasons. At that time no judgment was sought against Hubbard. Only months later did plaintiff first ask for judgment against Hubbard for attorney's fees and expenses. (A. 46) Hubbard then engaged counsel and asked for a trial. But Hubbard's liability was adjudged without a hearing. The only evidentiary hearing permitted was on the amount to be assessed against him. (A. 629)

Hubbard denied the charges against him, including the recitals in the court's opinion. (A. 623; 84, 85, 86-87, 91, 93-94) He asserted the right to see and to cross-examine

the witnesses against him. He demanded a trial by jury. (A. 84-85) He was denied the right to bring in evidence and disprove the statements made in the court's memorandum against him. (A. 624)

Reese Hubbard attached to his Answer affidavits and statements of 14 sitting judges, before whom he had tried a legion of jury cases. Each judge vouched unqualifiedly for his proper conduct in all cases tried before him. (A. 125-137)

The peculiar vice of the court's collateral acceptance of the record in the civil case and on the post trial hearing is shown forcefully in connection with the charge that Hubbard prevented the Nevada court reporter, Butterfield, from coming to Chicago to testify on one day's notice. (See pp. 14-15, 21, *supra*)

Reese Hubbard categorically denied the charge. No witnesses appeared at the post trial hearing to contradict him. Nor did Hubbard bring witnesses to the post trial hearing from Nevada to corroborate himself.

But, a lawyer's statement of fact is normally taken at face value in a civil proceeding against his client. When the trial court decided not to take Hubbard's statement and denial at face value, due process required a full evidentiary hearing. The Las Vegas attorney, William Singleton, would know whether Reese Hubbard contacted him on November 16, 1965 to refuse to release Butterfield from a November 17 deposition in his office. Reese Hubbard had the right to present Singleton's evidence on this issue.

Further, at such a hearing Butterfield's testimony that she had talked only to Jacobson's office girl, had agreed to come only if she could get a substitute reporter for the Singleton deposition, and had not purchased her ticket, could have been presented. (See pp. 15, 21, *supra*)

Similarly, on the first charge of "objectionable trial

strategy", namely, failure to prove Kiefel's statement to the telephone operator Tracy that he and his wife were fighting and that she had chained him out, Tracy could have testified that Hubbard had brought her all the way from Las Vegas to testify (A. II 609), as he said he would in his opening statement. This was the only matter from the opening statement which was not proved. But for the erroneous ruling sustaining plaintiff's improper objection "to anything that he plaintiff's husband said" (A. 558-559), Tracy would have testified.

Under the foregoing authorities, Hubbard was entitled to an evidentiary hearing on the court's charges, after advance, specific notice. In *Re Ruffalo,* 390 U. S. 544; 88 S. Ct. 1220, 20 L. Ed. 2d 117, 1968, in the course of a disbarment proceeding, an additional charge 13 was added. This Court held that adding the charge denied procedural due process: the lawyer was entitled to prior notice that the matter in Charge 13 would be considered a disbarment offense.

Had Hubbard been accorded an evidentiary hearing, with specific findings of fact and conclusions of law, as required by Rule 52, the appeal would have been structured by the findings. Hubbard then could not have been faced with (1) ex parte statements from other cases, (2) untried charges not listed in the post trial motion, and (3) untried charges from the subsequent retrial before Judge Decker, F. R. C. P. 52; F. R. Cr. P. 42.

Irrespective of whether Rule 52 required specific findings of fact and conclusions of law in the order granting the new trial [February 28, 1966], such findings were required when the court later [October 10, 1966] decided to use that collateral determination as the sole factual basis for its "costs" judgment against Hubbard. (A. 623, 627-630)

The object of Rule 52, requiring specific findings of fact

and law, is to define the issues for appellate review and for application of the doctrine of *res judicata.* (5 Moore, Federal Practice, § 52.02(5), citing committee report).

That the opinion giving the plaintiff a new trial is inadequate to fulfill the requirements of Rule 52(a) is shown by the Court of Appeals' resort to other cases, and to untried charges not relied on by Judge Robson.

The law is clear that if the findings are too general to satisfy the rule, the reviewing court may not "search the record and supply findings which the trial court failed to make." *Kelley* v. *Everglades Drainage District,* 319 U. S. 415, 418, 63 S. Ct. 114, 87 L. Ed. 1485, 1487 (1943); *Gregory* v. *City of Chicago,* 37 U. S. Law Week 4213, 4215 (March 10, 1969), citing *In re Oliver,* 333 U. S. 257, 273 (1948) on this point.

To the extent that the opinion of the Court of Appeals relied on matter from the retrial, from other cases and from matters not relied on by Judge Robson in entering the judgment appealed from, the Court has exercised original, rather than appellate jurisdiction.

The patent inadequacy of the trial court's opinion as findings of fact is perhaps best illustrated in connection with the charge that Hubbard prevented the appearance of Butterfield, by causing Singleton to refuse to release her from a scheduled deposition. To warrant any proceeding against Hubbard personally, he must necessarily have communicated with Singleton or his office after Hamlin testified on November 16, 1965, to request them to refuse to release Butterfield on Nov. 17, 1965.

But, the court did not find that Hubbard actually did anything. The court, rather, avoids a finding, by using such evasive, but emotionally-colored, phraseology as

(a) he "*hamstrung* plaintiff's counsel in precluding the appearance of an out of town court reporter to testify . . ." (A. 35);

(b) "... *indications are* that counsel [Hubbard] manipulated matters so that the court reporter would not be available . . ." (A. 40);

(c) "It is therefore evident that improper pressure *could have been* brought to bear to preclude the release of the court reporter . . ." (A. 41) (Emphasis supplied.)

The law is concerned with actualities, not speculation. Such language most certainly is inadequate to constitute a "finding" under either Rule 52(a), F. R. C. P., or the contempt rule, Rule 42(a), F. R. Cr. P.

Nor is the statement, quoted *supra*, p. 5, that Hubbard uses "every sly trick and stratagem to win his cases", a finding or a certificate which "recite(s) the facts" within the foregoing rules. *Widger* v. *U. S.*, 244 F. 2d 103, 107 (C. A. 5, 1957); *Tauber* v. *Gordon*, 350 F. 2d 843, 847 (C. A. 3, 1965).

As the latter court pointed out (350 F. 2d at p. 845):

> "Such a *general characterization* of behavior over a seven day trial period is not specific enough to satisfy the requirement of Rule 42a . . ."
>
> "This requirement is more than a formality. It is essential to disclosure of the basis of decision to permit *informed appellate review.*"
>
> "But, counsel's enumeration of occurrences which, in his view after the event, afforded a proper basis for the contempt order cannot be substituted for the required specification by the trial judge * * *" (emphasis supplied).

See also *Gregory* v. *City of Chicago*, 37 U. S. Law Week 4213, 4215 (3-10-69).

28 U. S. C., § 1927 was not enacted to permit a federal court to ignore the foregoing constitutional limitations.

There was not the slightest semblance of due process in these proceedings against Reese Hubbard.

3. The decision is in direct conflict with *In re Murchi-*

son, 349 U. S. 133, 99 L. ed. 942, 75 S. Ct. 623. The outcome of this proceeding turned on evidence of events which took place outside Judge Robson's presence, *e.g.,* the substance of various telephone calls to and in Las Vegas, Nevada on November 16, 1965. (See p. 19, *supra.*) Hence, it was error for the court to retain this phase of the case, after transferring the rest of the case to another judge. (A. 67-83) F. R. Crim. Pr. 42(b).

Further, the trial court improperly denied Hubbard's demand for jury trial of the fact issues. (A. 84-124, 138, 139) 18 U. S. C. §1(3), 402. U. S. Const., Amend. VI, VII.

4. Certiorari should be granted to review the unprecedented, and, we submit, dangerously unconstitutional process by which the Court of Appeals, and the trial court, in its fact finding, went beyond the record in this case, and considered conclusively certain past decisions in which Reese Hubbard was not a party, as evidence of a general disposition to engage in "objectionable trial strategy."

In *Michelson* v. *United States,* 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948) this Court expressed the public policy of the common law as follows:

> "* * * The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. * * *"

More recently, Chief Justice Warren stated in *Spencer* v. *State of Texas,* 385 U. S. 554, 87 S. Ct. 648 (1967):

> "* * * While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due

> Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. * * * Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. * * *''

The basis of the rule is succinctly stated by Wigmore as follows (1 Wigmore on Evidence, § 57, p. 456):

> ''The policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normandom—the instinct of giving the game fair play even at the expense of efficiency of procedure. This instinct asserts itself in other departments of our trial-law to much less advantage. But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. **The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may well be condemned now that he is caught,** is a tendency which cannot fail to operate with any jury, in or out of court. There are also indirect and more subtle disadvantages.'' (Emphasis supplied.)

That the prejudicial effect of such improper matter is not limited to juries is compellingly shown in this case in both opinions below which place reliance thereon.

Further, the past cases relied on by the courts below are capable of easy explanation, and do not even reflect on the general character of Reese Hubbard. As an example, *Quality Molding Co.* v. *American Nat. Bank*, 287 F. 2d 313, 316 (1961), on which the Court places its principal reliance, was handled by other members of the office, exclusive of Reese Hubbard.

The omission of the clause "when the appellant entered and took possession of the property and exercised its rights of ownership over the same," 287 F. 2d 316, from a quotation in a brief, did not render that quotation misleading.

The issue in the quoted case was whether an eminent domain judgment bore interest during the landowner's appeal. Under the statute, Cahill's Ill. R. S. 1931, ch. 47, § 10, the order upon the report of the jury was not a judgment unless and until the condemnor took possession. Therefore, there was no judgment until the condemnor took possession. The citation was thus squarely in point. Finally, *Quality Molding* was later held to be a wrong interpretation of the Illinois law regarding interest on judgments. *Pinkstaff* v. *Pennsylvania R.*, 31 Ill. 2d 518, 522 (1964).

Nor was Hubbard guilty of misconduct in *Ryan* v. *Monson*, 33 Ill. App. 2d 406. Hubbard procured a transcript of the proceeding and in his answer in detail showed that there is no basis for any of Judge McCormick's criticism. (A. 100-119)

In the case of *Cline* v. *Kirschwehm Bros.*, 42 Ill. App. 2d 85, Judge McCormick made similar criticism of Kirkland, Ellis, Hodson, Chaffetz & Masters, one of the largest and most highly respected law firms of Illinois. That case was tried before the Honorable Wilbert F. Crowley, one of Illinois' most highly respected judges. Judge Crowley stated under oath that Reese Hubbard has always conducted himself properly before him. (A. 126)

As to the Court of Appeals' statement (*infra*, p. A. 28) concerning *People ex rel. General Motors Corp.* v. *Bua*, 37 Ill. 2d 180, Reese Hubbard's Answer denied "that Reese Hubbard had any part in determining whether records of General Motors would be produced, and as to which records should be produced." (A. 119-120.) The discovery deci-

sions were made by staff counsel of General Motors, as the opinion of the Illinois Supreme Court duly reflects. 37 Ill. 2d 180 at pp. 186 ("production in Detroit"), 187 ("one of its staff attorneys"). Hubbard was nowhere named.

Nor is the reference by the Court of Appeals to events at the subsequent retrial of the injury case proper or relevant. (*Infra,* p. A. 28) Judge Decker's statement was simply based upon an erroneous conception of the evidence point involved.

At the first trial plaintiff had testified:

"Q. Were any items stolen from your purse?
A. No."

Hubbard objected to the question and the answer was stricken. (A. 196-197)

On the second trial Hubbard, after giving the court the page of the transcript, asked plaintiff whether she was asked the above question and whether she gave that answer. (A. II, 277-278)

Plaintiff answered: "That I don't remember." (A. II 278) No objection was made to the question.

Hubbard afterwards read the question and answer into evidence as an admission. (A. II 639) Nor was objection made at this time.

The judge's subsequent criticism of this action, quoted by the Court of Appeals (*infra,* p. A. 29) is premised on a misunderstanding of Illinois law regarding admissions.

"Any statement of a party no matter when or how made is admissible as an admission." 18 Illinois Law & Practice, Evidence, § 131, pp. 262-263. See also, *Susemiehl* v. *Red River Lumber Co.,* 306 Ill. App. 430, 435, 28 N. E. 2d 143 (1940), *aff'd.* 376 Ill. 138, 33 N. E. 2d 211 (1941).

If this opinion below, affirming a judgment entered against a trial lawyer without a hearing, is allowed to

stand, it will become the classic illustration of how basic guarantees may be eroded, how if certainty of wrongdoing is thought to appear, there is no need of a trial. Here a lawyer is punished, but at other times, this standard has cost many a simple man his life.

Attorney's Fees.

5. The judgment assessing one-third of all attorney's fees in the lengthy three appeals is without foundation in American law, and is in direct conflict with Rule 39(c, e) [quoted *infra*, p. A. 5] of the recently enacted Federal Rules of Appellate Procedure, as well as with this Court's recent decision in *Fleischmann* v. *Maier Brewing Co.*, 386 U. S. 714, 87 S. Ct. 1404, 18 L. Ed. 475 (1967). *Accord, Consolo* v. *Federal Maritime Commission*, 383 U. S. 607, 616, 16 L. Ed. 2d 131, 138-139, 86 S. Ct. 1018 (1966).

Rule 39(c) extended the costs allowable on appeal to briefs. Had counsel fees been within this Court's contemplation when it made these recent amendments, they could easily have been permitted.

Similarly, Rule 39(e) makes taxable in the district court the costs of the reporter's transcript, the bond premiums and the filing fee in the district court. The Court of Appeals was thus not authorized to direct the trial court to determine and tax one-third of all counsel fees on appeal.

Neither the court's opinion, nor the plaintiff's briefs below, cited authority for the unusual order. Indeed, plaintiff's counsel at no time ever requested such an award of attorney's fees on appeal.

The award of attorney's fees should be reversed.

6. In making an unsolicited award of attorney's fees, after partially reversing the judgment below, the opinion is in direct conflict with 28 U. S. C., § 1912 (quoted *infra*, p. A. 6), which limits the award of extra costs to cases in

which the judgment appealed from has been "affirmed." Further, the amount of the costs which may be awarded is limited to "single or double costs."

The instant opinion is in direct conflict with *Consolo* v. *Federal Maritime Commission,* 383 U. S. 607, 616, 16 L. ed. 2d 131, 138-139, 86 S. Ct. 1018 (1966), which expressly stated that "additional costs, *although not attorney's fees,* may be assessed against * * * the losing party under 28 U. S. C., § 1912." (Emphasis supplied.)

Further, it has been uniformly held that for 28 U. S. C., § 1912, giving a Court of Appeals or the Supreme Court the power to assess "double costs" to operate, the court must find that the appeal is frivolous and has been prosecuted solely for delay. Normally, such an order is made only when an appeal has been dismissed on motion as unsubstantial or frivolous. *Deming* v. *Carlisle Packing Co.,* 226 U. S. 102, 57 L. Ed. 140, 33 S. Ct. 102.

Where, however, the judgment appealed from is reversed or simply reduced, it has been held that a court is without power to assess additional costs under this section. *Globe Const. Co.* v. *Brewer,* 197 F. 2d 707, 708-709 (C. A. 5, 1952).

Further, even if the judgment is affirmed, extra costs will be denied, where, as here, the issues are novel and the appeal has been taken in good faith. *Petition of World Tradeways Shipping Ltd.,* 373 F. 2d 860, 862 (C. A. 2, 1967).

7. In awarding attorney's fees on appeal, after substantially reducing the judgment, the instant case is the civil counterpart of two criminal decisions which are currently being reviewed by this Court: *Simpson* v. *Rice,* 396 F. 2d 499, 500 (C. A. 5, 1968), *affirming* 274 F. Supp. 116, 119-121 (M. D. Ala. 1967) *cert. granted* (No. 418) 393 U. S. 922, 89 S. Ct. 292; *North Carolina* v. *Pearce,* 397 F. 2d 253 (C. A. 4, 1968), *cert. granted* (No. 413) 393 U. S. 932, 89 S. Ct. 258, 21 L. Ed. 2d 268.

See also *Marano* v. *U. S.*, 374 F. 2d 583 (C. A. 1, 1967); *Patton* v. *North Carolina*, 256 F. Supp. 225 (W. D. N. Car. 1966), *aff.* 381 F. 2d 636 (C. A. 4, 1967).

In these cases it was held that a criminal defendant's right of appeal was substantially impaired, if a court could impose an increased sentence on remandment.

Here, Reese Hubbard's appellate counsel succeeded in having the judgment against him reduced by more than 78 per cent, from $8,171.56 to $1,741.20, by eliminating $6,430.36 of patently illegal items from the award. Nevertheless, the Court of Appeals then restored the $6,430.36 of cuts by its award of appellate costs. (R. 7, *infra*, p. A. 32)

The opinion (*infra*, p. A. 32) awards $1,959.70 of printing fees against Reese Hubbard despite his partially successful appeal. Such action constituted a gross abuse of discretion.

Further, it awards to plaintiff's counsel one-third of all their attorney's fees on the three appeals. (R. 7, *infra*, p. A. 32) In view of the length of the record, and the complexity of the issues on the three appeals, Reese Hubbard could well be faced with a more severe judgment than that from which he appealed.

That possibility, in any case, civil or criminal, we submit, necessarily "penalizes" or "chills the right of appeal." *U. S.* v. *Ewell*, 383 U. S. 116, 127-128, 86 S. Ct. 773, 15 L. Ed. 2d 627, 635 (1966); *Cichos* v. *Indiana*, 385 U. S. 76, 81, 87 S. Ct. 271, 274, 17 L. Ed. 2d 175, 179-180 (1966).

(Expert Witness Fees.)

8. The decision, in awarding expert witness fees, is in direct conflict with the decision of this Court in *Henkel* v. *Chicago, St. Paul, M. & O. Ry. Co.*, 284 U. S. 444, 52 S. Ct. 223, 76 L. ed. 386 (1932), and with the following decisions from other circuits: *Motion Picture Patents Co.* v. *Steiner*, 201 Fed. 63 (2d Cir. 1912); *Green* v. *American Tobacco Co.*,

304 F. 2d 70, 77 (5th Cir. 1962); and *Euler* v. *Waller*, 295 F. 2d 765, 766 (10th Cir. 1961); and *Marquez* v. *American Export Lines*, D. C. N. Y., 1967, 41 F. R. D. 386. These latter decisions have been express that a district court lacks such authority.

Directly in point is *Motion Picture Patents Co.* v. *Steiner*, 201 Fed. 63, 65 (C. A. 1912), which expressly held that vexatious conduct of an opponent can not transform into costs matters such as expert witness fees, which would otherwise not be costs.

The judgment for $675.00 in expert witness fees for the first trial should be reversed.

(AS TO THE CLIENT, LAS VEGAS HACIENDA, INC.).

1. There was an adequate basis in the record made by this defendant for the courts below to rule on plaintiff's motion for a new trial. Resort to *ex parte* comments from opinions in other cases, involving parties not in privity with this defendant, constituted a deprivation to this defendant of a fair trial and a fair appeal.

Such action of the trial court and the Court of Appeals violates the safeguards imposed by the law of *res judicata*, and by the due process clause. Such action is in conflict with this Court's decisions in the following cases, *Hansberry* v. *Lee*, 311 U. S. 32, 40-41, 85 L. Ed. 22, 26, 61 S. Ct. 115, 132 A. L. R. 741; *U. S.* v. *Pink*, 315 U. S. 203, 216, 86 L. Ed. 796, 810, 62 S. Ct. 552, with the following decisions from the Seventh Circuit, *Binks Mfg. Co.* v. *Ransburg Electro-Coating Corp.*, 281 F. 2d 252, 260 (C. A. 7, 1960), and from the Fourth Circuit, *Moore* v. *United States*, 360 F. 2d 353, 358 (C. A. 4, 1966). (Wife not bound by husband's income tax conviction in civil tax fraud proceeding, even though she signed joint return.)

See also *Alderman* v. *U. S.*, 37 U. S. Law Week 4190, 4191

(3-11-69, and *Kolod* v. *U. S.*, 390 U. S. 136, 138, 19 L. Ed. 2d 962, 964, 88 S. Ct. 752 (1968) on the importance of an "adversary" "evidentiary" determination of all issues in a case.

It would constitute a profound inequity and discrimination against the clients of aged or experienced trial lawyers, if they were bound by every matter ever litigated adversely to their counsel in his entire career. The opinion cites no authority supporting the proposition that an attorney's clientele throughout his career are in sequential privity.

Moreover, even if the insurmountable barrier of lack of privity could be bridged, the same fundamental considerations of public policy that bar introduction of past offenses to show a general disposition to commit crime, would require review and reversal of the decision below.

Those considerations have been stated by this Court as follows: *Michelson* v. *United States,* 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948)

> "* * * The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. * * *"

More recently, Chief Justice Warren has said in *Spencer* v. *Texas,* 385 U. S. 554, 87 S. Ct. 848 (1967)

> "* * * while this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals

> and of state courts, suggest the evidence of prior crime introduced for no purpose other than to show criminal disposition would violate the Due Process Clause * * *".

A leading secondary authority highlights the criticism of the prior offense testimony as follows:

> "* * * The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court. * * *" 1 Wigmore on Evidence, § 57, p. 456.

Reference to prior offenses has long been the subject of severe criticism. See Comment, 78 Harvard L. Rev. 426 (1964); Comment, 70 Yale L. J. 763 (1961); 10 Rutgers Law Review, 531, 532 (1956); 3 Wigmore, Evidence, §§ 896-918 (3rd ed. 1940).

All that the reference to other cases shows is that this defendant was deprived of a fair trial and appeal by an atmosphere of prejudice against its counsel, Reese Hubbard, which long antedated this case.

2a. The decision is in conflict with the decision of this Court in *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285, 36 L. Ed. 706, 12 S. Ct. Rptr. 909 (1892), with a past decision of the Seventh Circuit in *American Cooperative Serum Assn.* v. *Anchor Serum,* 153 F. 2d 907, 912 (1946), and with the following decisions of the Second Circuit: *U. S.* v. *Annunziato,* 293 F. 2d 373, 376-378 (C. A. 2 1961); *DeRonde* v. *Gaytime Shops, Inc.,* 239 F. 2d 735 (C. A. 2 1957). See also *Keshner* v. *Keshner,* 376 Ill. 354, 55 N. E. 2d 877 (1941); VI Wigmore on Evidence, 3rd Ed. (1940) §§ 1725, 1729, 1730, pp. 79-85, 91, 93-94. (See p. 11, *supra.*)

Under the foregoing decisions the declarations of Carl Kiefel, plaintiff's husband, to the maid and telephone operator, were erroneously refused admission in evidence at

the second trial. (A. II 615) Such action constituted prejudicial, reversible error.

The declaration to the telephone operator Tracy was that he had had words with his wife and that she had chained him out of the room. (A. 609)

Although Carl Kiefel had previously been dismissed as a party, such evidence was admissible under an exception to the hearsay rule showing motive, intent, design or state of mind, illustrated by the above authorities. Such evidence thus bore importantly on what Judge Robson described as the first critical issue of the case, namely "(1) who inflicted the injuries, her [then] husband, or an intruder?" (A. 35)

Similarly, the erroneously excluded evidence of Carpenter, the maid, bore on what the court described as the second critical issue of the case, namely "(2) If an intruder, did he gain entrance through plaintiff's contributory negligence by virtue of an unlatched door. . . ." (A. 35) The Carpenter evidence was that Kiefel told her, when she admitted him to the room, that he had told his wife to leave the door open, that he was coming up, and when he got back to the room, the door was locked. (A. 604)

2b. The decision is in conflict with *U. S.* v. *Annunziato* (1961), 2 Cir., 293 F. 2d 373, 377; *Yarborough* v. *Prudential Ins. Co.* (1938), 5 Cir., 99 F. 2d 874, 100 F. 2d 547. See also *Fitzgerald* v. *Benner* (1906), 219 Ill. 485, 494, 76 N. E. 709, which states the further exception to the hearsay rule respecting utterances which relate to and throw light on or explain a nonverbal act which is independently admissible. See 31 Yale L. J. 229, 236; McCormick, Evidence (1954), pp. 586-587.

Kiefel's declaration to the maid, who had to let him in the room with her pass key, explains why Kiefel did not

pick up the second key at the desk: he expected the door to be open. (See pp. 11-12, *supra.*)

Similarly, Kiefel's statement to the operator concerning his fight with his wife threw light on evidence (1) that he disregarded orders of the security chief and picked up the assault weapon, thereby destroying fingerprints; and (2) that he did not render assistance to the wife and did not accompany her to the hospital, although critically injured. (See pp. 11-12, *supra.*)

2c. The decision is in direct conflict with *Forsyeth* v. *Doolittle,* 120 U. S. 73, 30 L. Ed. 586 (1877); *Miller* v. *Mathias,* 145 Ill. App. 465 (1908); *Toler* v. *Bishop,* 84 Ill. App. 278 (1899), which recognize a third exception to the hearsay rule, relating to declarations by one joint tenant or occupant of premises as admissible against the other.

Plaintiff's husband contracted for the trip and the room for both himself and plaintiff. He also acted as her agent in making the payment of $376 for transportation and for the room for himself and plaintiff. They occupied the room jointly. Hence, statements of Carl Kiefel respecting their use and occupancy of the room were admissible against plaintiff. No issue is more relevant in this case than whether the door was (a) left unlocked, (b) locked, or (c) locked and chained. (See p. 12, *supra.*)

The foregoing legal points were Hacienda's principal contentions of error respecting the second trial. They were Points I and II of Hacienda's brief and reply brief. But, they were completely ignored by the Court of Appeals. (A. 32-34)

Under F. R. C. P., 43 (*infra,* p. A. 2) the courts below were required to receive any evidence admissible under either federal or state rules of evidence. *U. S.* v. *Featherstone,* C. A. 10, 1963, 325 F. 2d 540, 542; *Rain* v. *Pavkov* (1966), 3rd Cir., 357 F. 2d 506, 509-510. Such rules can not

be mere matters of "tactical interplay," as the Court of Appeals erroneously suggests. (*Infra*, p. A. 33)

Review should be granted to determine whether under Rule 43, F. R. C. P., a federal district court or Court of Appeals has any discretion to reject evidence which is competent under both state and federal law.

The erroneous disregard of Hacienda's most important legal contentions respecting the second trial by both the trial court and the Court of Appeals, must have been prompted by the courts' improper consideration of past criticisms of Reese Hubbard in opinions from cases involving other parties.

3. The decision is in conflict with *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 412, 488 L. Ed. 520 (1944) and with the following decisions of the Courts of Appeals: *Duncan* v. *Duncan*, 377 F. 2d 49 (C. A. 6, 1967); *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F. 2d 532 (2d Cir. 1965), *cert. denied*, 382 U. S. 983, 86 S. Ct. 559, 15 L. Ed. 2d 472 (1966); *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir.) (*En banc*) (1960), *cert. denied*, 364 U. S. 835, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960) and *Fassbinder* v. *Pennsylvania R. R. Co.*, 322 F. 2d 859 (3rd Cir. 1963) (*En banc*), to the extent that it permits the trial court to grant a new trial simply because the court dislikes the verdict, or the successful attorney.

In each of the foregoing Court of Appeals decisions a jury verdict, set aside by a trial judge, was reinstated on appeal, as a result of the reviewing court's recognition of the fundamental collision between the parties' constitutional right to a jury's verdict, and the trial judge's right to set aside that verdict if the latter right is unlimited, the former right is reduced to a mere nullity.

As has been shown above, pp. 9-15, evidence does not sustain the three charges of "objectionable trial strategy" relied on by the court:

1. Presenting Tracy as a witness would have been a useless gesture under the court's erroneous evidence ruling, which excluded anything said by Carl Kiefel. (A. 558-559)

Plaintiff's counsel knew Tracy's name was on the pretrial list, and had recently taken her statement. (A. 11, 12, 42) If he wished to bar mention of her testimony in Hubbard's opening statement, he could easily have moved for a protective order. Failing that, he ought to have objected to the opening statement when made, and not waited until the filing of the post trial motion.

2. Hubbard had no duty to file the uncertified Hamlin deposition, rather than return it to the court reporter for certification. (See pp. 12-13, *supra.*)

3. Plaintiff's inability to bring the reporter Butterfield to Chicago on one day's notice did not warrant the grant of a new trial, in view of plaintiff's failure to move for a continuance to accommodate the reporter's schedule. (See cases cited *supra,* p. 14.)

Certiorari should be granted and the original judgment in favor of defendant, Las Vegas Hacienda, Inc., should be reinstated.

CONCLUSION.

The petition of Hubbard, the trial lawyer, should be granted and the judgment against him vacated, because the entire "costs' proceeding is without valid precedent and is in fundamental conflict with the statute designed to protect the independence of trial lawyers to represent their clients.

Alternatively, Hubbard prays that certiorari be granted and

1. the award of expert witness fees be vacated, and
2. the remand for assessment against Hubbard of opposing counsel's fees on appeal be vacated, or

3. that the matter be remanded to the district court for a proper evidentiary hearing.

Las Vegas Hacienda prays that certiorari be granted and that the original judgment in its favor be reinstated, or that a new trial be granted.

Respectfully submitted,

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APPENDIX A.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS.

FEDERAL RULES OF CIVIL PROCEDURE.

RULE 30. *Depositions Upon Oral Examination.*

* * * * *

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

RULE 43. *Evidence.*

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

RULE 52. *Findings by the Court.*

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

RULE 61. *Harmless Error.* No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by

the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE 42. *Criminal Contempt.*

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

RULE 39 FEDERAL RULES OF APPELLATE PROCEDURE FOR U. S. COURTS OF APPEALS.

RULE 39. *Costs.*

* * * * *

(c) Costs of Briefs, Appendices, and Copies of Records: The cost of printing or otherwise producing necessary copies of briefs, appendices. or copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment.

* * * * *

(e) Costs On Appeal Taxable In the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

STATUTES.

18 U. S. C. A., § 401.

§ 401. *Power of court.*

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

28 U. S. C. A., § 1912.

§ 1912. *Damages and costs on affirmance.*

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs. June 25, 1948, c. 646, 62 Stat. 954.

28 U. S. C. A., § 1913.

§ 1913. *Courts of appeals.*

The fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and uniform in all the circuits. June 25, 1948, c. 646, 62 Stat. 954.

28 U. S. C. A., § 1920.

§ 1920. *Taxation of costs.*

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955.

28 U. S. C. A., § 1923.

§ 1923. *Docket fees and costs of briefs.*

(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

$20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;

$20 in admiralty appeals involving not over $1,000;

$50 in admiralty appeals involving not over $5,000;

$100 in admiralty appeals involving more than $5,000;

$5 on discontinuance of a civil action;

$5 on motion for judgment and other proceedings on recognizances;

$2.50 for each deposition admitted in evidence.

(b) The docket fees of United States attorneys shall be paid to the clerk of court and by him paid into the Treasury.

(c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:

$25 where the amount involved is not over $1,000;

$50 where the amount involved is not over $5,000;

$75 where the amount involved is over $5,000.

June 25, 1948, c. 646, 62 Stat. 956; June 18, 1954, c. 304, 68 Stat. 253.

28 U. S. C. A., § 1927.

§ 1927. *Counsel's liability for excessive costs.*

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs. June 25, 1948, c. 646, 62 Stat. 957.

AMENDMENTS TO THE UNITED STATES CONSTITUTION.

U. S. C. A. Const. Amend. 6.

Amendment VI—Jury trial for crimes, and procedural rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

U. S. C. A. Const. Amend. 7.

Amendment VII—Civil trials.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U. S. C. A. Const. Amend. V.

Amendment V--Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B.

1. OPINION OF THE DISTRICT COURT, ENTERED FEBRUARY 28, 1966, APPEARING AT 39 F. R. D. 592 (1966) AND AT A. 35-41.

DONNA M. KIEFEL, *Plaintiff*,

v.

LAS VEGAS HACIENDA, INC., a California corporation, *Defendant*.

No. 63 C 1982.

UNITED STATES DISTRICT COURT
N. D. Illinois, E. D.

Feb. 28, 1966.

ROBSON, *District Judge*.

Plaintiff moves for a new trial and seeks to have the verdict and judgment thereon against her set aside. Several grounds are advanced. The court concludes that one of those grounds is sufficient basis for the granting of a new trial.

The court is of the opinion that plaintiff has not had a fair trial due to the objectionable trial strategy of defendant's counsel. In substance, those tactics consisted of knowingly making prejudicial insinuations in his opening statement which were not substantiated by evidence. Further, he hamstrung plaintiff's counsel in precluding the appearance of an out-of-town court reporter to testify in respect to an important deposition which had not been filed, in violation of the rules of court. Other less im-

portant conduct occurred in the course of the trial, which alone might not warrant the granting of a new trial, but viewed cumulatively, in conjunction with the aforestated acts, are more than sufficient to make the court conclude that the plaintiff was not accorded a fair chance to present the facts of her case to the jury.

Plaintiff sued in a two-count complaint for damages from an assault in her room in defendant's motel. The first count was in tort and the second in contract. There is no question that the assault occurred and that very serious skull and other injuries were inflicted. The critical questions were: (1) Who inflicted the injuries, her husband or an intruder. (2) If an intruder, did he gain entrance through plaintiff's contributory negligence by virtue of an unlatched door, or plaintiff's negligence due to intoxication, or other circumstance. (3) Did the assault proximately result from defendant's negligence in failing to provide an adequate lock on the door or in not maintaining sufficient security guard in the corridor.

Very snide insinuations were made by defendant's counsel that plaintiff and her husband had had an altercation the previous evening. Counsel indicated he would prove it by the husband's statements to the switchboard operator when he repeatedly, vainly tried to reach his wife in their room in the early hours. Defendant's counsel similarly intimated by cross-examination, along the same line, which questioning would be followed by impeachment, but no impeachment on the subject ever occurred.

The court grants this motion for a new trial solely from its own observation of defense counsel's tactics, irrespective of the citation of similar action by the Illinois courts occasioned by the same counsel's conduct in the same regard (*Ryan* v. *Monson,* 33 Ill. App. 2d 406, 179 N. E. 2d 449 (1961); *Cline* v. *Kirchwehm Bros. Cartage Co., Inc.,* 42 Ill. App. 2d 85, 191 N. E. 2d 410 (1963). The decisions do,

however, furnish corroboration that his acts were not mere happenstance, inadvertently and unintentionally occurring. In contrast, the court notes the strenuous and futile efforts of plaintiff's counsel to combat the insidious effect resulting from the artfully planted statements of defense counsel.

There is an extended discussion of the granting of motions for a new trial in *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3rd Cir. 1960). It is there said, at 90:

> "* * * New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new trials ordered for other reasons: for example, evidence improperly admitted, *prejudicial statements by counsel* * * *. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible. In the latter instances, * * * the trial court delivered the jury from a possibly erroneous verdict arising from circumstances over which the jury had no control. Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial." (Emphasis added.)

The rule of law is stated in 39 American Jurisprudence, New Trial § 53, thus:

> "Misconduct of counsel for one party, if of such a nature as to influence a verdict in favor of that party, or to prevent the adverse party from having a fair trial is * * * ground for a new trial. * * *
>
> "* * * In order to warrant the granting of a new trial, the objectionable conduct must appear to have been prejudicial to the interest of the complaining party. * * *"

Section 54, *ibid:*

> "Improper remarks and comments of counsel for a party, made in the presence and hearing of the jury, if of such character as to influence a verdict, prevent a fair trial * * * and * * * furnish good grounds for a new trial. * * *
>
> "As the right to a new trial may be founded upon counsel's misstatements of facts, or his statements of facts which have not been introduced in, or established by, evidence, frequently a new trial is sought and obtained upon the ground that counsel has made statements or arguments appealing to the emotions and prejudices of the jury."

Section 55, *ibid:*

> "The courts recognize the fact that proof frequently fails to come up to expectation, and the tendency is to permit counsel a reasonable latitude in stating to the jury the facts proposed to be shown, and when no substantial prejudice results * * * a new trial will not be required merely because of reference by counsel, in a civil case at least, in his opening statement to matters which he subsequently makes no attempt to prove. *The rule is different, however, where it is clear that prejudice resulted to the opposing side from the remarks of counsel in his opening statement, which was not cured by the action of the court.* * * *" (Emphasis added.)

Also in point are the numerous decisions and texts cited by plaintiff: Cleary, Handbook of Illinois Evidence § 9.11, p. 144; *Schoolfield* v. *Witkowski,* 54 Ill. App. 2d 111, 203 N. E. 2d 460 (1964); *Gordon* v. *Checker Taxi Co.,* 334 Ill. App. 313, 79 N. E. 2d 632 (1948); *Miller* v. *Chicago Transit Authority,* 3 Ill. App. 2d 223, 121 N. E. 2d 348 (1954); *Marut* v. *Costello,* 53 Ill. App. 2d 340, 202 N. E. 2d 853 (1964); 118 A. L. R. 543; *Duff* v. *Ewing,* 60 Ill. App. 2d 382, 208 N. E. 2d 320 (1965).

The court does not agree that there "was nothing in the opening statement calculated to enflame the jury." State-

ments in respect to a husband-wife rift could have had great weight in the jury's decision as to whether the husband was the culprit in the assault.

The parts of the opening argument of counsel for the defense, which plaintiff cites as unsupported by subsequently presented evidence, are

> "The evidence will show that *the facts* concerning this unfortunate event *are within the knowledge of the plaintiff and her husband, and no one else* that we know of." (R. 5)
>
> * * * * *
>
> "The evidence will show that during that evening that the husband was making repeated telephone calls to this room, and that *the husband told the telephone operator that he and his wife had had a fight,* and that she wouldn't let him in the room." (R. 6)
>
> * * * * *
>
> "Now the room itself, when a person enters the room after you enter the door, to the right is the bathroom, and when the bathroom light is on and the door open, that *light is a strong light* and it shines in the face of anyone that comes in the door, so any person that was looking could see and *recognize such person.*
>
> "The evidence will show that outside the door, and immediately above where the two doors are there is another light, and it was a bright one, so that anyone opening the door, this light would shine on that person, so *even though a person were lying in bed they could see that person as to who that person was.*
>
> "I believe the evidence will show that the plaintiff stated after she had been in bed and had probably gone to sleep, that she looked up and she saw a man who she says was coming through the door, that she said 'Carl,' or something to that effect. She made no outcry whatsoever. * * *
>
> "* * * The evidence will show that she made no outcry." (R. 7-8) (Emphasis added.)

Plaintiff testified she did not recall a bright light shining outside the door, and that the hall seemed quite dark as she walked down it.

On cross-examination, plaintiff was asked if she had any differences of opinion with her husband and she answered no. When reminded that she left, "and alone," she replied she was tired and left to go to bed.

She stated again the light was dim by her door; that it was not real bright. The bathroom door was not wide open. The light from the corridor did not shine on the man. She called out her husband's name, "Carl." She was asked if she called "because you recognized the person you saw, did you not?" She answered, "I did not recognize him."

Mr. Kiefel when asked if he made a telephone call to his room from 2:00 a. m. to 7:00 a. m. said that he did not make one single telephone call. He was then asked: "Isn't it a fact that you began telephoning at 2:00 o'clock and continued telephoning until 7:00?" When an objection was sustained, counsel stated he was asking the question to lay the foundation for impeachment. Mr. Kiefel answered: "It is not." Then followed the question, "Did you, during that period, make between 12 and 14 telephone calls to your room?" The answer again was "I did not. * * * I didn't make any telephone calls during that period. Only at 6:30 when I went back to the room after playing blackjack when I telephoned my wife."

The court has reviewed the testimony of Sharon Hamlin, the nurse on duty in the hospital where plaintiff was taken after the occurrence. There are manifest inconsistencies between her statements, deposition, testimony and hospital records as to the state of consciousness of plaintiff at a time when plaintiff was questioned in the hospital. There are plain indications of the witness's hos-

tility to personal injury suits. She had signed her deposition, she states, which deposition she brought with her to Chicago and left it at defendant's counsel's office, yet that deposition was never filed with the Clerk of the Court. Further, the indications are that counsel manipulated matters so that the court reporter who took the depositions or statements would not be available to appear at this trial to verify from her notes the actual interrogation and answers which took place. At plaintiff's counsel's request, she had agreed to appear here and had purchased her ticket, and at the last moment reneged on the ground that she could not be released from a deposition scheduled for the next day by an attorney who had on occasion represented the insurer of defendant, and in whose offices the critical deposition was taken. Plaintiff's counsel asked that attorney to reschedule the deposition but he refused. Defendant counsel's associate had retained that same Las Vegas attorney to represent defendant in another deposition taken in this cause. It is therefore evident that improper pressure could have been brought to bear to preclude the release of the court reporter from the scheduled deposition in order to prevent her appearance as a witness in the case.

As plaintiff points out, the Canons of Professional Ethics proscribe argument asserting as a fact something which had not been proved, or the introduction of statements into argument with intent to influence a jury (Canon No. 22).

The court is convinced that because of the unprofessional tactics of Reese Hubbard, counsel for defendant, the plaintiff did not have a fair trial. Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead, he seeks to use his experience to assert and apply every sly trick and stratagem to win his case. He does this with the hope that he can

stay within the bounds of professional ethics. In this instance, he has far overstepped the bounds. This court finds that his trial tactics were such that the jury might or could have been influenced by his unfair actions and as a result found for the defendant.

The motion for new trial is granted.

2. OPINION OF THE COURT OF APPEALS, APPEARING AT 404 F. 2D 1163 AND AT R. 1-16.

DONNA M. KIEFEL, *Plaintiff-Appellee,*

v.

LAS VEGAS HACIENDA, INC., a California corporation, *Defendant-Appellant,*

REESE HUBBARD, *Respondent-Appellant.*

DONNA M. KIEFEL, *Plaintiff-Appellee,*

v.

LAS VEGAS HACIENDA, INC., *Defendant-Appellant.*

Nos. 15933, 15976, 16210.

UNITED STATES COURT OF APPEALS
Seventh Circuit.

Nov. 15, 1968.

As Amended Dec. 31, 1968.

Rehearing Denied Jan. 6, 1969.

Before HASTINGS, FAIRCHILD and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.*

These cases come before this court on appeals from two separate trials in the district court and an appeal from an order assessing costs and attorneys' fees in the first of the two trials.

Plaintiff-appellee Kiefel and her husband* purchased a

*Divorced shortly after the first trial.

package air travel and hotel plan to Las Vegas in February, 1962. They were lodged in Room 315 of the Las Vegas Hacienda. On the evening and morning of February 28-March 1, 1962, plaintiff and her husband visited three night club shows and consumed several drinks. Returning to their hotel, another drink was had at the bar and plaintiff went off to their room to bed, while her husband remained in the casino stating he remained there until 6:30 a.m. Sometime before 5:20 a. m. someone entered Room 315 and attacked plaintiff, striking her on the head with a bottle of champagne, fracturing her skull and causing severe facial lacerations.

The complaint and amended complaint are founded in contract and tort for failure of defendant, Las Vegas Hacienda, to provide a reasonably safe sleeping room accommodation resulting in the personal injuries to plaintiff.

Case No. 15933

The first trial was heard by the Honorable Edwin A. Robson. After the jury returned a verdict for the defendant, plaintiff filed a motion for a new trial based on defense counsel respondent-appellant Reese Hubbard's alleged acts of misconduct. The court granted the motion and filed an opinion, *Kiefel* v. *Las Vegas Hacienda, Inc.*, 39 F. R. D. 592 (N. D. Ill. 1966). The question presented by this appeal is whether the acts of misconduct were such as to require a new trial.

Plaintiff-appellee cited in her brief on appeal no less than ten items of misconduct involving the first trial and the pre-trial discovery as well as six additional items of misconduct at the second trial. With respect to the first trial, Judge Robson's opinion relied on two of the ten items of misconduct as individually requiring a new trial and further found that the remaining misconduct, when "viewed

cumulatively, in conjunction with the aforestated acts, are more than sufficient to make the court conclude that the plaintiff was not accorded a fair chance to present the facts of her case to the jury." 39 F. R. D. at 593.

The first of the specific acts was the inclusion of statements in Hubbard's opening remarks to the jury which the court found to be capable of inflaming the jury, 39 F. R. D. at 595. The second of the acts was the failure to file a deposition in the case together with causing the reporter who took the deposition to be unavailable as a witness at the trial. 39 F. R. D. at 596.

The motion for a new trial asserted other misconduct including 1) making assertions of facts not proved, 2) attempting to improperly influence the jury by the introduction of statements into argument on matters not in evidence under the pretext of laying a foundation for impeachment which were never offered, 3) examining witnesses on an exhibit which was never offered in evidence, 4) repeatedly making known meritless objections both in the trial and pre-trial phases of the case for the purpose of harassment, 5) falsely stating to the court that he did not have a deposition which he apparently had under his control and probably was in his own office, and 6) objecting to the introduction of a deposition on the ground that he did not authorize it when it was taken under order of court entered after an agreement made by his co-counsel. In response to some of these acts, the court noted, 39 F. R. D. at 596:

> As plaintiff points out, the Canons of Professional Ethics proscribe argument asserting as a fact something which had not been proved, or the introduction of statements into argument with intent to influence a jury (Canon No. 22).

Whether on the basis of the two specific acts discussed by the court or the other acts viewed cumulatively, it is

clear that Judge Robson was correct in granting the motion for a new trial. The legal authority set out in Judge Robson's opinion is sufficient to support his determination. 39 F. R. D. at 594-595. In addition to that authority, we rely on *Mangan* v. *Broderick & Bascom Rope Co.*, 351 F. 2d 24, 29, 31 (7th Cir. 1965), *Ryan* v. *Monson*, 33 Ill. App. 2d 406, 412-413, 415-417, 424 and 427-428 (1st Dist. 1961), and *Cline* v. *Kirchwehm Bros. Cartage Co., Inc.*, 42 Ill. App. 2d 85, 191 N. E. 2d 410 (1963), all cases in which new trials were ordered due to improper trial tactics and unprofessional conduct on the part of the present respondent. We find that Judge Robson was correct in holding, 39 F. R. D. at 596:

> The court is convinced that because of the unprofessional tactics of Reese Hubbard, counsel for defendant, the plaintiff did not have a fair trial. Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead, he seeks to use his experience to assert and apply every sly trick and strategem to win his case. He does this with the hope that he can stay within the bounds of professional ethics. In this instance, he has far overstepped the bounds. This court finds that his trial tactics were such that the jury might or could have been influenced by his unfair actions and as a result found for the defendant.
>
> The motion for new trial is granted.

Accordingly, we affirm the decision of the district court granting plaintiff-appellee's motion for a new trial.

Affirmed.

Case No. 15976

After the conclusion of the trial before Judge Robson, the plaintiff filed a motion to assess costs and attorneys' fees against defendant Las Vegas Hacienda, Inc., and Reese Hubbard jointly and severally. The court entered a judgment order against defendant and counsel in the sum of Eight Thousand One Hundred Seventy-one Dollars and Fifty-six Cents ($8,171.56) consisting of Six Thousand One Hundred Dollars ($6,100.00) in attorneys' fees and Two Thousand Seventy-one Dollars and Fifty-six Cents ($2,071.56) as costs, and itemized as follows:

Attorneys' fees:

(a) James A. Brandvik, the sum of— for the trial of this cause;	$2,000.00
(b) Lowell H. Jacobson, the sum of— for the trial of this cause;	3,000.00
(c) James A. Brandvik and Lowell H. Jacobson, for services in connection with the post-trial motion—	1,000.00
(d) James A. Brandvik, attorney's fees in connection with the Las Vegas deposition of Sharon Hamlin—	100.00
Total Attorneys' Fees	$6,100.00

Costs:

(a) Claude Youker, reporter's bills—	$ 947.15
(b) Graham & Associates, for service of summons on expert witnesses, mileage and advancement of witness fees—	101.80
(c) Court Reporter Stella Butterfield for copy of Sharon Hamlin deposition not previously filed—	17.25

(d) Expert witness fees for plaintiff's experts as follows:		
1. Dr. Textor	$ 75.00	
2. Dr. Halstead	$250.00	
3. Dr. Cutler	150.00	
4. Locksmith James Busch	200.00	675.00
(e) Air fare to Las Vegas and return regarding deposition of Sharon Hamlin—		230.36
(f) Meals and lodging incurred by Attorney James A. Brandvik in connection with deposition—		100.00
Total Costs		$2,071.56

From this order defendant-appellant and respondent-appellant appeal.

The authority for assessment of costs is set forth in 28 U. S. C. §§ 1920, 1921, 1923 and 1927. The specific items taxable as costs are limited by the express language of the statute. *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964); *Braun* v. *Hassenstein Steel Co.*, 23 F. R. D. 163 (D. S. D. 1959) and Federal Rules of Civil Procedure, Rule 54(d). 28 U. S. C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

This section of 28 U. S. C. relieves Las Vegas Hacienda of any responsibility for costs assessed by the trial court, and any costs assessed are taxable to Reese Hubbard personally.

While it is relatively unusual for a decision to be reversed due to prejudice injected into the trial by an attor-

ney, or to require a new trial therefor, it is uncommon to assess costs on the attorney involved. This is a power which the courts should exercise only in instances of a serious and studied disregard for the orderly processes of justice. In the language of the statute, it is a power which is exercisable only where the effect of the attorney's conduct is such as "unreasonably and vexatiously" increases the costs. The attorney's conduct, described previously, is clearly within these restrictive standards. His acts of misconduct were correctly found to be intentional, involving serious breaches of the Canons of Ethics. In view of Judge Robson's finding of Hubbard's "long and extensive trial experience," we also deem it appropriate to consider Hubbard's conduct in past cases.

Counsel Reese Hubbard's history of past misconduct is well documented in the prior opinions of this court. The first occasion we had to consider his conduct was in *O'Shea* v. *Jewel Tea Co.*, 233 F. 2d 530 (7th Cir. 1956). In the trial of that case, Reese Hubbard offered to produce a witness for the defense who could testify as to whether another witness was not blind; a fact which, if shown, would have permitted a defense exhibit to be introduced into evidence. The witness was not produced and, on appeal, the defense urged that the failure to admit the exhibit was error. In discussing that issue, the court held, 233 F. 2d at 533:

> If counsel for the defendant had witnesses to prove such facts he should have, in fairness to the trial court, introduced their testimony as part of his defense.

The court then also observed that certain statements of the trial judge to which exception was taken on appeal by defendant were, in part, "entirely justified by the actions of defense counsel * * *." 233 F. 2d at 535.

In *Quality Molding Co.* v. *American Nat'l Fire Ins. Co.*, 287 F. 2d 313 (7th Cir. 1961), Reese Hubbard on behalf of the plaintiff, seriously misquoted an important precedent

both in the trial court and in the brief filed in this court. After showing the nature of the misquote, the court held, 287 F. 2d at 316:

> We would much prefer to think the omission of the all important words was inadvertent. However, counsel for defendants states the same omission was made in the District Court, and the misquotation was specifically called to the attention of plaintiff's counsel in the trial brief which was filed by defendants.
>
> A sloppy mistake in a quotation might be at least understandable on the part of a careless attorney. But, a deliberate misquotation calls for a strong condemnation. However, we do not initiate disciplinary action in this Court because there is a bare possibility that the fact that counsel's quotation was not correct might not have come to the personal attention of the attorney preparing the brief in this Court.
>
> Attorneys whose names are affixed to briefs filed in this Court have a heavy responsibility to see to it that quotations from the opinions of other courts as well as other statements therein are completely accurate.

Because of the serious consequences which may result from that type of misconduct, this court was most reluctant to find that the misquote was intentional.

However, the circumstances surrounding the misconduct in *Mangan* v. *Broderick & Bascom Rope Co.*, 351 F. 2d 24 (7th Cir. 1965), left no doubt that this later misconduct was intentional. After objections were sustained to questions offered by Reese Hubbard and his offer of proof for the defense was denied, he persisted in asking a question which improperly injected the issues of workmen's compensation and insurance into the trial. This court described the circumstances and held that the misconduct would justify a new trial for the plaintiff, 351 F. 2d at 29:

> • • • Subsequently, in his examination of one of the treating physicians, counsel asked the physician who

had paid plaintiff's bill and elicited the answer that the insurance company had done so. The question and answer were stricken. Though the court chastised counsel for his *deliberate disobedience to the court's prior admonition,* plaintiff's motion for a mistrial was denied.

* * * * *

In this case, the conduct of defendant's counsel in his cross-examination of Schweitzer's office manager, the doctor and Borchardt *in defiance of the court's admonition* was an act not to be condoned. The motive for such questioning could not have been entirely an attempt to show possible bias of the witnesses. The doctor was not a Schweitzer employee. He could have no possible interest in the case. Borchardt was not a Schweitzer employee as we shall presently show. Thus, even if the judge was correct in his ultimate ruling that evidence of the receipt of workmen's compensation might be adduced to show the possible bias of witnesses, we are still faced here with gross error. *Counsel's willingness to inject that evidence into the case at any cost is sufficient to earn him a new trial for plaintiff.* [Emphasis added.]

This court also warned that other intentional misconduct on his part should not be repeated, 351 F. 2d at 31:

> Finally, the conduct of defendant's counsel in cross-examining a witness upon an exhibit which was not in evidence and which was never offered in evidence was such a *deliberate misuse of the judicial process* that it must not be repeated upon a retrial of this suit. [Emphasis added.]

In *Neusus* v. *Sponholtz,* 369 F. 2d 259 (7th Cir. 1966), Reese Hubbard again engaged in prejudicial cross-examination. The court called attention to the misconduct, 369 F. 2d at 260-261, fn. 2:

> Although we do not reach these questions, the objectionable trial tactics of defense counsel for American, Reese Hubbard, should not escape comment. His con-

duct was very unprofessional in several instances, particularly with respect to his method of cross-examination by unsupported innuendo, and were it not for our resolution of the principle issue a new trial would have to be granted to the plaintiff. * * *

* * * * *

The cross-examination tactic of attorney Hubbard is particularly objectionable in this case because it appears to have been undertaken deliberately and with complete disregard of the consequences. The same counsel has been criticized on a number of occasions for the same tactic and other tactics which are questionable from the standpoint of professional ethics. * * * [Emphasis added.]

The court then cited its earlier opinions on point and the decision of Judge Robson in the first trial of the case now before us.

Respondent Hubbard's unprofessional conduct has also been criticized by the Illinois Supreme and Appellate Courts in opinions entered after our criticism in *Quality Molding*. In *Ryan* v. *Monson*, 33 Ill. App. 2d 406, 179 N. E. 2d 449 (1st Dist. 1961), the court reversed a judgment for the defendant in a personal injury action because Hubbard's various acts of misconduct formed a pattern which permeated the trial and tainted the judgment. Specifically, he harassed opposing counsel during pre-trial discovery; engaged in improper cross-examinations; made erroneous statements of fact to the trial court and of law to the jury; examined a witness on exhibits not in evidence which he did not show to opposing counsel; and made inflammatory statements in closing argument. Id. at 412-413, 415-417, 424 and 427, 179 N. E. 2d 449. The opinion also ordered that the case be remanded for a hearing on a motion to assess expenses and attorney's fees due to the misconduct. Id. at 427-428, 179 N. E. 2d 449. In *Cline* v. *Kirchwehm Bros. Cartage Co., Inc.*, 42 Ill. App. 2d 85, 191 N. E. 2d 410

(1963) a new trial on the issue of damages was ordered because of Hubbard's misconduct including, once again, improper cross-examination and repeated disregard for rulings of the trial judge. Most recently, in *People ex rel. General Motors Corp.* v. *Bua,* 37 Ill. 2d 180, 226 N. E. 2d 6 (1967), Respondent Hubbard was found to have "sought to obstruct the orderly processes of discovery" by harassing opposing counsel contrary to "the spirit of the rules." Id. at 192 and 195, 226 N. E. 2d at 14.

It is important to note that these past acts of misconduct are of the same nature as those engaged in during and preceding the first trial of this case. This is especially so in regard to four types of misconduct: 1) making misstatements of fact and law to the juries and the courts, 2) using harassing and obstructionist tactics in pre-trial discovery, 3) injecting inflammatory statements into argument which were calculated to prejudice the juries, and 4) conducting improper cross-examination on matters not in evidence or on issues to which the court had already sustained objection.

Not satisfied with the lesson he should have learned from the outcome of the first trial and the judgment of costs against him, Hubbard continued his misconduct at the second trial. During the argument on the defendant's motion for a new trial at the end of the second trial, Judge Decker expressed his strong disapproval with the misconduct at the second trial. Judge Decker reprimanded Hubbard for seeking numerous postponements of the second trial and then appearing on the date specifically set asking for a stay due to the appeal in this case which Hubbard had been preparing all along but of which he had never notified the trial court. Hubbard, while reading a deposition aloud changed an answer from "incorrect" to "correct," thus reversing its meaning. He also stated that thousands of motels were equipped with the type of door

lock involved in the case when, in fact, there were not thousands of motels but thousands of locks in a small number of motels. But these were not the gravest acts of misconduct.

At one point, Hubbard stated that Mrs. Kiefel had been asked a question and had answered and represented this as part of her testimony at the first trial. In fact, the question and answer had been stricken at Hubbard's own objection. Judge Decker gave him an opportunity to correct his statement to the jury. When Hubbard did not choose to do so, Judge Decker commented, Appendix vol. II at 761:

> The Court: All right. Well, I don't know what a court—what a Court of Appeals would say as to the propriety of trial tactics should [sic] as you engaged in telling the jury that this was her testimony at the last trial when the record shows that the question and the answer were both stricken. Now, perhaps that will someday be called to the Court's attention.

At the hearing on the defendant's motion for a new trial, Hubbard accused the court of prejudicing the jury by raising his voice. Judge Decker could only recall one instance where he raised his voice and that occurred when Hubbard tried to surreptitiously slip an exhibit into the jury room which had been denied admission more than once. He said, Additional Appendix at 205-06:

> I will plead guilty to at least one occasion when I raised my voice above its normal level. It occurred, however, at the conclusion of the case and out of the presence of the jury when the defendant's counsel presented me with a number of defendant's exhibits which he asked me to have taken to the jury room. It was discovered that included among these exhibits was one particular selected portion of a medical record to which objection had been repeatedly sustained during the trial, not once, but a number of times. *In my*

> *opinion, the insertion of this exhibit which had not been admitted in evidence was not inadvertent.* I can say that a trial judge's patience is not inexhaustible. I did raise my voice. [Emphasis added.]

Just as "No man is an island unto himself" but each has effect on the whole, no attorney stands by himself. Each attorney's acts reflect on the entire profession. Respect for one encourages respect for all while the misconduct of one impairs the integrity of all. The unprofessional conduct in these two trials and in the history of Hubbard's practice as shown by prior appellate opinions is outrageous in nature. In *Quality Molding,* we declined to assume that his misquotation before this court was intentional. We can no longer indulge in an assumption of inadvertence, especially as to the misconduct shown in this case. Nor is there any doubt that Hubbard could be unaware that his conduct could lead to an assessment of costs against him in view of the fact that in *Ryan* v. *Monson,* a remand was had for that very purpose.

While the assessment of costs is provided for by the statute, attorneys' fees are not ordinarily assessed on a party. As stated in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U. S. 714 at 717, 87 S. Ct. 1404 at 1407, 18 L. Ed. 2d 475 (1967):

> The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. This Court first announced that rule in *Arcambel* v. *Wisemann,* 3 Dall. 306, 1 L. Ed. 613 (1796).

Attorney's travel expenses for taking of depositions are not taxable. *Michigan Aluminum Foundry Co.* v. *Aluminum Co. of America,* 190 F. 903 (CCA 1911) and *Hope Basket Co.* v. *Product Advancement Co.,* 104 F. Supp. 444 (W. D. Mich. 1952).

From and under the application of the various sections of 28 U. S. C. the court finds and concludes:

That the sum of Six Thousand One Hundred Dollars ($6,100.00) comprising attorneys' fees:

(a) James A. Brandvik, the sum of— for the trial of this cause;	$2,000.00
(b) Lowell H. Jacobson, the sum of— for the trial of this cause;	3,000.00
(c) James A. Brandvik and Lowell H. Jacobson, for services in connection with the post-trial motion—	1,000.00
(d) James A. Brandvik, attorney's fees in connection with the Las Vegas deposition of Sharon Hamlin —	100.00
Total Attorney's Fees.....	$6,100.00

are eliminated from the judgment hereinbefore entered.

The court has further considered the costs:

(e) Air fare to Las Vegas and return regarding deposition of Sharon Hamlin—	$ 230.36
(f) Meals and lodging incurred by Attorney James A. Brandvik in connection with deposition—	100.00

and eliminates these items in the sum of Three Hundred Thirty Dollars and Thirty-six Cents ($330.36).

The Court sustains the costs:

(a) Claude Youker, reporter's bills—		$ 947.15
(b) Graham & Associates, for service of summons on expert witnesses, mileage and advancement of witness fees—		101.80
(c) Court Reporter Stella Butterfield for copy of Sharon Hamlin deposition not previously filed—		17.25
(d) Expert witness fees for plaintiff's experts as follows:		
1. Dr. Textor	$ 75.00	
2. Dr. Halstead	250.00	
3. Dr. Cutler	150.00	
4. Locksmith James Busch	200.00	675.00

in the total sum of Seventeen Hundred Forty-one Dollars and Twenty Cents ($1,741.20) against Reese Hubbard personally.

The Court further finds under 28 U. S. C. § 1927 that because of the additional proceedings caused by the conduct of Reese Hubbard, this matter is remanded to the trial judge for assessment of costs against Reese Hubbard for the expenses of printing plaintiff-appellee's 54 page brief and the additional appendix in No. 15976 and a sum no greater than one-third (⅓) the plaintiff-appellee's attorneys' fee incurred in the appeal of cases Nos. 15933, 15976 and 16210.

It is hereby ordered that the district court give and enter judgment in favor of plaintiff, Donna M. Kiefel for the use and benefit of her attorneys, James A. Brandvik and Lowell H. Jacobson, and against Reese Hubbard individually in the amount of Seventeen Hundred Forty-one Dollars and Twenty Cents ($1,741.20) and the additional amounts consisting of no more than one-third plaintiff-appellee's attorneys' fee incurred as a result of the appeal of cases Nos. 15933, 15976 and 16210, and the total cost of printing plaintiff-appellee's 54 page brief and the additional appendix in No. 15976 as reimbursement for costs by plaintiff-appellee's attorneys for and on behalf of plaintiff-appellee.

Affirmed in part, reversed in part, remanded with directions.

Case No. 16210

The second trial was had before the Honorable Bernard M. Decker. At the conclusion of the trial, the jury reached a verdict in favor of plaintiff-appellee Donna Kiefel in the amount of One Hundred Thousand Dollars ($100,000.00) against defendant-appellant Las Vegas Hacienda, Inc. (hereafter called Hacienda). Judgment was entered on the verdict against Hacienda and an order was entered on March 15, 1967, increasing the costs taxed by the clerk by an additional One Hundred Sixteen Dollars and Ten Cents

($116.10). From this judgment and order, Hacienda appeals.

The primary issue raised by this appeal is whether the facts were sufficient in law to support the jury's verdict. The three particular questions asked by Hacienda are:

1. Was the lock actually forced open on the night of the occurrence?

2. Was the assailant an unknown intruder or might it have been Carl Kiefel, plaintiff's husband?

3. Did Donna Kiefel lock the door before going to bed, or did she leave it open for her husband?

The testimony in the record indicates the lock used on the door to Room 315 was a Schlage lock, model A 51-PD. The projection of the bolt in the lock taken from the door is $\frac{3}{8}$ of an inch. Witness James Busch, a master locksmith, testified the lock was defective, since there was $\frac{1}{8}$ of an inch of play or $33\frac{1}{3}\%$ of the total length of the bolt. Additionally, there was testimony that the door was loose fitting and the cutting of the door for the installation of the lock was larger than necessary, allowing additional play of another $\frac{1}{8}$ of an inch, leaving only $\frac{1}{8}$ of an inch security in the lock. Daniel G. Olson, Schlage Lock Company representative, testified there was evidence of a "gouge" on the lock resulting in damage. The local police department was on the scene and in the course of the investigation noted there were fresh paint chips from the door and molding at the base of the lock and chips on the floor at the door entry to the room "that appeared to be of the same type of paint that was present on the door and door jamb and appeared to be relatively fresh." The police report recorded that "upon closer examination noted the door had recently been shimmed."

Additionally, on the night of the incident, travellers checks were reported stolen from Donna Kiefel's purse which was in the room when the assault occurred. These

checks were located by the police the following day and were determined to have been forged and cashed at a hotel several blocks from the Hacienda by an unknown person.

All of this information was before the jury through exhibits, depositions, and examination and cross-examination of the witnesses. There was adequate latitude allowed by the trial court for the defense to raise the questions of fact now placed before this court as well as the tactical interplay by defense counsel. The jury found the factual questions in favor of the plaintiff and there are adequate grounds for its so finding.

Hacienda also contends that the trial judge erred in refusing to admit its Exhibit No. 7 into evidence. Exhibit No. 7 consisted of one page of the nurses' notes which were notes made by the nurses attending Donna Kiefel during her hospitalization. The pertinent portion of Exhibit No. 7 are notes made by Nurse Sharon Hamlin of a statement made by Donna Kiefel at approximately 3:00 a. m. on March 4, 1962. The notes indicate that Donna Kiefel said she left "the door unlocked so that her husband could come in—."

We find no reversible error in excluding Exhibit No. 7. This exhibit was one page copied from Exhibit No. 10-A which consisted of all the pertinent hospital reports. Exhibit No. 10-A was admitted into evidence and Nurse Hamlin was examined on it at length. Thus, there was no omission of this important evidence as it was presented to the jury and presumably weighed in arriving at its verdict.

We perceive no error in the other objections raised by Hacienda.

The judgment on the verdict and the order taxing costs are hereby affirmed.

Affirmed.

3. THE JUDGMENT OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago, Illinois 60604.

Friday, November 15, 1968.

Before

Hon. John S. Hastings, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Otto Kerner, Circuit Judge

DONNA M. KIEFEL,
Plaintiff-Appellee,
No. 15933 and 15976 (Consolidated)
vs.
LAS VEGAS HACIENDA, INC., a California corporation,
Defendant-Appellant,
REESE HUBBARD,
Respondent-Appellant.

DONNA M. KIEFEL,
Plaintiff-Appellee,
No. 16210
vs.
LAS VEGAS HACIENDA, INC.,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decisions, judgments and orders in this cause appealed from be, and the same are hereby AFFIRMED in part, REVERSED in part and REMANDED to the said District Court with directions, in accordance with the opinion of this Court filed this day.

SUPREME COURT, U. S.

FILED
MAY 6 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968.

No. 1235

REESE HUBBARD AND LAS VEGAS HACIENDA, INC.,
Petitioners,

vs.

DONNA M. KIEFEL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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JAMES A. BRANDVIK,
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STate 2-8572,
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Donna M. Kiefel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968.

No. 1235

REESE HUBBARD AND LAS VEGAS HACIENDA, INC.,
Petitioners,

vs.

DONNA M. KIEFEL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Three separate appeals were taken in this case: No. 15933, which is an appeal by the defendant, Las Vegas Hacienda, Inc., from the order of Judge Robson granting a new trial; No. 15976, which is an appeal by the respondent Reese Hubbard, attorney for the Las Vegas Hacienda, Inc., from the order assessing costs and attorneys' fees against him. These two appeals were consolidated by order of the United States Court of Appeals for the Seventh Circuit on December 29, 1966. Also filed was a separate appeal by the Las Vegas Hacienda, Inc., No. 16210, which is an appeal from the $100,000 plaintiff's judgment on the verdict in the second trial of this case. This appeal was never consolidated with the other two contrary to

representation in the Petition for Writ of Certiorari filed here by the petitioners (Pet. p. 1).

All extraordinary costs and attorneys' fees, which are at issue in the pending petition are against Reese Hubbard, attorney for the Las Vegas Hacienda, Inc., personally, and not against the Las Vegas Hacienda. Thus, the petition as to costs and attorneys' fees concerns only Attorney Reese Hubbard and the prayer to review the personal injury award concerns only Las Vegas Hacienda.

QUESTIONS PRESENTED.

A. (As to the Defendant, Las Vegas Hacienda, Inc.)

1. Should this court grant certiorari and review a personal injury judgment, no assessment of costs or attorneys' fees being involved, based upon alleged errors in lower court rulings on evidentiary matters of such insignificance that they were not even commented upon by the Court of Appeals?

2. Should this court grant certiorari and review findings of fact by two District Court judges and the Court of Appeals finding that defendant's trial lawyer, Reese Hubbard, engaged in outrageous, unethical, and unprofessional trial tactics in two trials of this case? Is not the impact of this misconduct clearly shown by the difference in the two verdicts in the two trials of this case; i.e., the not guilty verdict in favor of the defendant in the first trial and the $100,000 verdict in favor of the plaintiff in the second trial?

3. Should this court grant certiorari and review an order granting plaintiff a new trial based upon misconduct of counsel when such new trial order was the result of the trial court's personal observation of such misconduct, particularly when such new trial order was affirmed by the Court of Appeals?

B. (As to Respondent, Attorney Reese Hubbard.)

1. Does not a court have inherent, statutory and court rule power to award attorneys' fees and/or costs where the defense has been "maintained in bad faith, vexatiously, wantonly or for oppressive reasons"?

2. Can a trial lawyer of years of experience repeatedly make false statements to the court; attempt to improperly influence a jury by the introduction of statements not in evidence under the pretext of laying a foundation for impeachment but never carrying through; examine witnesses on an exhibit never offered in evidence; repeatedly make known meritless objections both in trial and pre-trial phases of the case for the purpose of harassment; delay and prolong the proceedings by falsely denying agreements previously made for depositions; secrete a deposition in his office and prevent its filing; allege inflammatory material in his opening statement and then never offer any proof of the same; cause the necessity of two trials of a personal injury case by his actions, and then claim that he should not be liable for excessive costs?

3. Can the respondent Hubbard reasonably argue that his conduct is unintentional or accidental when in the second trial of this case he again engaged in shocking trial practices such as attempting to slip an excluded exhibit into the jury room when such exhibit was on numerous occasions ruled inadmissible by the court; repeatedly misquote portions of depositions to the jury leaving out material unfavorable to his client; misquote the transcript of the first trial record on cross-examination of a witness; filing an untimely abortive notice of appeal six months after the new trial order requiring plaintiff's counsel to file a short record on appeal with the Court of Appeals and to obtain by motion and briefs the dismissal of the abortive appeal; to be found guilty of misconduct in numerous other cases in the Illinois Appellate and Supreme Courts and the Court of Appeals and then claim that the new trial was granted in this case "simply because it (the court) dislikes either the verdict or the lawyer" (Pet. p. 5)?

4. Does the phrase "Independence of the Profession"

offer a convenient word shield to those who seek to misuse the license of this honorable profession?

5. Is a lawyer entitled to a jury trial before the court may assess costs for his misconduct occurring in the presence of the court and imposed after notice, motion, hearing and briefs and not under civil or criminal contempt?

6. Is not the award of costs a proper method available to an aggrieved plaintiff to be made whole who has been put to additional costs and expenses by a defense lawyer engaged in blatant misconduct for the purpose of economically pulverizing the opposition by costly tactics?

STATUTES AND RULES INVOLVED.

The following statutory and rule provisions, reprinted in Appendix A, involved are: 28 U. S. C. sec. 2111 (Harmless Error); Illinois Revised Statutes, Chap. 110, Sec. 41 (Untrue Statements); Federal Rules of Appellate Procedure, Rule 38 (Damages for Delay); Federal Rules of Civil Procedure, Rule 37(a) (Refusal to Make Discovery: Consequence); Rule 52(a) (Findings by the Court); Rule 56(a) (Summary Judgment: Affidavits Made in Bad Faith).

STATEMENT OF THE CASE.

The Petitioners' Statement of the Case is so inaccurate and argumentative that we are compelled to submit a review of the facts in the case.

This case is a negligence action against the defendant hotel for failing to protect the plaintiff, a paying guest, from an assault by a stranger. Plaintiff established liability against the defendant on the theory of *Danile* v. *Oak Park Arms Hotel,* 55 Ill. App. 2d 2 (1964) and *Fortney* v. *Hotel Roncroft, Inc.,* 5 Ill. App. 2d 327 (1955). These cases held that a hotel should exercise a high degree of care to prevent an assault on a paying guest.

Plaintiff and her husband of Chicago were induced by advertising to go to Las Vegas and stay at the defendant hotel as a result of defendant's promotion of the so-called Hacienda Champagne Flight (Addl. A. 5).* Among other things they were to receive for the sum of $188 each, several bottles of champagne, three shows, a de-luxe room, and a flight from Chicago to Las Vegas on the Hacienda's airplane and back (A. I-99). After arriving in Las Vegas and being assigned to Room 315 at the defendant's hotel plaintiff and her husband went to various shows, gambled some, and on the day of this occurrence, took a trip to Hoover Dam and Lake Meade, returning to the hotel in the late afternoon hours (A. I-202). That evening plaintiff and her husband went to several shows, returning to the Hacienda in the morning hours, some time after midnight.

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* References to the appendices in this brief are as follows:
(A. 25)—(Appendix to Petition for Writ of Cert.).
(A. I-101)—1st Trial Appendix—#15933 and #15976.
(A. II-101)—2nd Trial Appendix #16210.
(Addl. A. 101)—Plaintiff's Additional Appendix.

Plaintiff then became tired and returned to her room leaving her husband in the hotel gambling casino with other persons on the tour (A. I-156-57).

On her return to the room she entered the alcove door which opens on the corridor, proceeded into the inner vestibule and used her key to open the door to Room 315. The adjoining room inside the alcove vestibule was occupied by strangers. She then closed the door and it was locked (A. II-285). In this regard the defendant's head of security, Orville Prolle, testified that the door automatically locked when it was closed (A. II-300).

In the first trial of this case the plaintiff's husband testified that he returned to his room at approximately 6:30 A.M. on the morning of the occurrence and was unable to awaken his wife through knocking on the door. He then obtained a maid with a passkey who opened the door and allowed him to enter Room 315 (A. I-223). He found his wife severely beaten, almost dead, with her torn and ripped nightgown on the bed. There was blood all over the room (A. I-223).

Plaintiff suffered serious, almost fatal injuries. She received a depressed skull fracture with permanent damage to the 5th, 6th and 7th cranial nerves. One side of her face including her eye is permanently paralyzed (A. II-406 and 429). She will never be able to move her eye normally again. She has no feeling if something gets in her eye (A. II-436-37). She has a permanent ear perforation (A. II-420). Her brain has been permanently damaged in the left hemisphere, in the temporal lobe area (A. II-188-89).

The Clark County Sheriff's police were on the scene in the morning of March 1st and their investigation revealed that the door to the plaintiff's room (315) had recently been jimmied or shimmed (Plts. Ex. 58 (A. II-818-823)).

The police took photographs of the door jamb and lock showing the shim marks and removed the lock mechanism, catch plate and plunger (A. II-103). These items were introduced into evidence in both trials of this case. Through the testimony of the architect who designed the defendant hotel it was established further that the outer door, or vestibule door, to Room 315 did not have a lock as was called for in the design. Other similar parts of the hotel had such a lock but not this vestibule door. Both plaintiff and defendant's lock experts agreed that the lock that was on Room 315 was defective (A. II-472-74).

The police investigation further revealed that $150 in travelers checks had been taken from the plaintiff's purse and had been forged at the Tropicana Hotel between 4:30 and 5:00 A.M. on the morning of this occurrence. Witnesses described the person who had cashed these checks (A. II-825, Plt. Ex. 82) and the person described was considered a prime suspect although never apprehended. Mrs. Kiefel, the plaintiff, testified that the assailant was a stranger to her (A. I-191).

Plaintiff was in the hospital unconscious for several days. Defendant relied heavily in the trial of the case on incoherent statements made by Mrs. Kiefel while a patient at the hospital immediately after her injury. Yet, the doctor who treated her said she was always "stuporous and semi-comatose" while at the hospital (A. I-461). In addition, the police woman who took one of the statements testified that plaintiff was not coherent while she was interviewed (A. II-644-645). Plaintiff's roommate while in the hospital also testified concerning her confused incoherent state of mind (A. II-383). This was a jury question resolved in favor of the plaintiff.

In the first trial of this case the Hacienda's attorney, Reese Hubbard, through the use of insinuation and in-

nuendo, in his opening statement and in cross-examination of witnesses, suggested that it was the plaintiff's husband who had committed this assault. The charge was made by innuendo (A. I-80-81). For Mr. Hubbard to have made such a charge in his opening statement would have opened the door to a complete rebuttal on the part of the husband. He was cleared by the police who confirmed his whereabouts that night, with other tour members and the evidence clearly showed that the assailant was an unknown person who had cashed the stolen travelers' checks. This was one of many acts of counsel's misconduct, which resulted in the granting of a new trial for plaintiff.

Interestingly enough, in the second trial of this case after the new trial had been granted based on Mr. Hubbard's misconduct, counsel for the plaintiff made a request that he not use such tactics in the second trial opening statement (A. II-82, 84-85). Mr. Hubbard denied that he ever accused the husband in the first trial and agreed he would not in the second trial (A. II-82-85).

The first trial resulted in a verdict for the defendant. Plaintiff filed a motion for new trial alleging numerous acts of misconduct by Defense Counsel Hubbard.

The defendant here takes the position that the new trial was granted solely on the three itemized items on objectionable trial strategy of respondent Hubbard. Although they were factors of consideration, others were considered also but are not mentioned in the petition filed here (Pet. pp. 9-15). Judge Robson's opinion granting the new trial clearly states (A. 11) "that the other misconduct alleged in the motion for new trial viewed cumulatively, in conjunction with the aforesaid acts, are more than sufficient to make the court conclude that the plaintiff was not accorded a fair chance to present the facts of her case to the jury." The court also stated that it granted the motion for new

trial (A. 11) "solely from its own observation of defense counsel's tactics."

The misconduct of Respondent Hubbard in the first trial of this case may be summarized as follows:

1. Misconduct in failing to file the deposition of witness Sharon Hamlin by misappropriating the deposition from the custody of the court reporter and by interfering with the reporter in the performance of her duty and obligation to file the deposition.

2. Falsely stating to Judge Robson that he did not have the original deposition of witness Sharon Hamlin nor did he know its whereabouts (A. I-514), then having this falsehood exposed by his own witness (A. I-537), again misstating that he had sent the transcript back to the court reporter (A. I-542). The court reporter testified she didn't receive it until some four months later, after the new trial was granted (A. II-781-82). Petitioner still denies this in its Petition filed here (Pet. p. 13).

The deposition was withheld by Mr. Hubbard because it contained the witness' inked-in changes of her answers under oath (A. II-30-67)—all unknown to plaintiff's counsel. Each of these changes favored the defendant (A. I-33-67). Defendant then urged that a copy of the deposition (without changes) be used rather than the withheld changed original. Notwithstanding the fact that Mr. Hubbard had the changed deposition in his office ("It was given to me, Your Honor.") (A. I-541), he still suggested to the Court in inquiry as to the accuracy of the deposition copy, "I am unable to say what corrections she made or whether she made any or not" (A. I-604). Hubbard improperly withheld the tools of impeachment.

THE IMPORTANCE OF THIS MISCONDUCT IS BETTER UNDERSTOOD WHEN IT IS RELATED TO IMPEACHING TESTIMONY SOUGHT TO BE SUPPRESSED AND IMPROPERLY WITHHELD. PETITIONERS' CHARGE II—SHARON HAMLIN.

Petitioners incorrectly describe witness Sharon Hamlin as a "*student* nurse" (Pet., p. 13). She was years removed from the "student" age.

Miss Hamlin also had indicated her prejudice against the plaintiff in a pre-trial statement. She had said that she loved Las Vegas, and "you could have a very bad effect on Las Vegas if this case gets out in the paper." Also, "there is nothing wrong with the Hacienda and there is nothing wrong with Las Vegas and I want to prove it because I like it here" (A. II-71).

Showing her feelings about plaintiffs she said, "I don't believe in suing people at the drop of a hat and being a nurse I am disgusted with it. I am and I think that is perfectly disgusting and that is what she is doing" (A. II-70).

Judge Decker found that this witness "without question" committed perjury in the second trial (Addl. A. 207). He also commented on the numerous changes which she made to her deposition, which deposition was not available for use at the first trial.

Judge Robson described her testimony as containing "manifest inconsistencies" and he also found evidence of her "hostility to personal injury suits" (A. 15-16).

3. Misconduct in making prejudicial cross-examination and opening statement on matters not in evidence of a highly prejudicial nature suggesting a husband and wife argument on the night of this occurrence and never offering proof in connection with the opening statement or the cross-examination (A. I-31).

THIS MISCONDUCT IS BEST UNDERSTOOD BY RELATION TO PETITIONERS' CHARGE I — HUBBARD'S OPENING STATEMENT AND HIS FAILURE TO PRODUCE TESTIMONY.

In Hubbard's opening statement he firmly planted a seed in the jury's mind about a husband and wife fight on the night of this occurrence (A. I-80-81, 82-83), then in his cross-examination of Donna Kiefel he stated that Donna knew who her attacker was (A. I-191 and 193); that she called out "Carl" when the attacker entered the room; and that she made no outcry (A. I-193).

Defendant never at any time offered any evidence that the husband had a fight with his wife (the plaintiff) that night, or that the husband had telephoned one of the hotel operators repeatedly about being locked out of his room because of such a fight. He did, however, cross-examine the husband about such a fight and received a denial (A. I-277). These questions were permitted under the guise of later impeachment which never appeared or was offered.

Finally, in the second trial, when defendant attempted to offer the testimony of the telephone operator Dixie Tracy, it was discovered that he couldn't even lay a proper foundation for its admissibility (Addl. A. 208, A. II-610).

4. Misconduct in exhibiting a large door replica allegedly of Room 315 of the defendant hotel, examining witnesses on it and then never attempting to introduce it into evidence (A. I-31, Addl. A. 31-33, 37).

5. Misconduct through their Las Vegas attorney-agent in failing to release a court reporter to come to Chicago to testify after a deposition was not filed (Addl. A. 136-37; A. I-26-29).

THIS MISCONDUCT IS RELEVANT TO THE UNAVAILABLE SHARON HAMLIN IMPEACHING DEPOSITION AND IS IMPORTANT TO UNDERSTANDING OF PETITIONERS' CHARGE III — THE UNAVAILABILITY OF THE COURT REPORTER BUTTERFIELD.

Page 15 of Petitioners' Brief states that reporter Butterfield never talked to Attorney Jacobson personally nor ever purchased a ticket to come to Chicago to testify. Yet the record shows the witness answered that she "had several conversations with him," and also that upon being contacted she did "call and made a reservation with an airline" (A. I-664-665). She also said "I got through to Mr. Jacobson" about 7:30 or 8:00 in the evening (A. I-664-665).

In addition, the attorney (Mr. Singleton) who prevented her from coming to testify was clearly connected with the defense of this case. At a deposition held in Singleton's office, Attorney Frank Hall, Mr. Hubbard's law partner, told a witness (A. I-28-29) that if he located certain items of evidence he should "notify Mr. Singleton here, who is a local lawyer. * * * and then maybe we can make some other arrangement." Mr. Singleton was also the local (Las Vegas) attorney for the defendant's insurance carrier. The entire sequence of events justify Judge Robson's opinion in the new trial order on this issue:

A. The failure of Hubbard to file the Hamlin original deposition although repeatedly requested to do so.

B. Hubbard's assurances to the court that he knew nothing of the deposition which was later shown to be a complete falsehood.

C. The admission from the witness that she personally delivered the deposition to Mr. Hubbard's office.

D. The initial agreement of the reporter to come to

testify and her later inability due to Mr. Singleton's refusal.

E. Mr. Singleton's connection with the defendant in this case. Under all of the harassment and lack of cooperation received from defense counsel in this case, how can he honestly suggest we should have asked him to intervene with Singleton.

6. Misconduct in steadfastly objecting to introduction into evidence of the deposition witness, Lt. William Witte, taken in Las Vegas on the grounds that there was no agreement to take this deposition (A. I-47-49) thus causing a half day hearing on this harassment tactic before Judge Robson (Addl. A. 42-69). The trial court considered this matter a very serious one and had all the attorneys testify concerning the alleged disagreement concerning the deposition. Thereupon, it became obvious that there was in fact an agreement to take the deposition and the court permitted the deposition to be read. The entire proceeding, however, took up much of the court's time and delayed the orderly process of the trial (Addl. A. 53-54).

7. Refusal to cooperate in the pre-trial phase as to the admissibility of exhibits as a harassment tactic since the same exhibits were admitted at the trial without objection or on no valid grounds for objection (A. I-51-53).

Judge Robson repeatedly warned defendant's counsel concerning their meritless objections and the obstructionist program during the pre-trial stages and he further warned that he would tax costs at trial if he found these objections to be improper (Addl. A. 21-22; Addl. A. 45; Addl. A. 26-27; A. I-148).

8. Defense counsel in the pre-trial stages constantly relied on technical meritless objections to the admissibility of the lock assembly and catch plate thus requiring counsel to take further police depositions in Las Vegas (A. I-53-

54). Pltf. Ex. 52A and 52B were admitted in the first and second trials without objection (Addl. A. 77-78; A. II-126). Defense Counsel Hubbard objected during trial to police photos taken at the scene of the crime and listed in the pre-trial order as Exhibits in which defendant's attorney, Frank Hall, stipulated and had no objection. This type of conduct took up a good deal of the Court's time. (Plts. Ex. 1-6, A. I-358, 367). For the defense trial objection see Addl. A. 35-37.

9. Defense counsel objected to the certain paid medical bills incurred by the plaintiff, copies of which were given to defense counsel long before trial and were part of the pre-trial order (A. I-54). The paid medical bills were admitted into evidence at the first trial and in the second trial but only after serving requests to admit (Addl. A. 153).

As Judge Kerner said in his opinion (A. 28): "Not satisfied with the lesson he should have learned from the outcome of the first trial and the judgment of costs against him, Hubbard continued his misconduct at the second trial."

This included:

1. Attempting to slip an exhibit into the jury room which had been denied admission into evidence on repeated occasions (Addl. A. 205-206).

2. Filing some 6 months later an abortive appeal from the new trial order in the last minute before second trial was to begin (Addl. A. 171), harassing plaintiff's attorneys by causing them to file a short record with the Court of Appeals with motions and briefs to obtain the dismissal of the frivolous appeal.

3. Intentionally misreading a deposition to the jury leaving out the word "Doctor," in reading the previous testimony of Dr. Ward C. Halsted, Ph.D., Professor at

the University of Chicago Medical School and Director of Medical Psychology at Billings Hospital (A. II-195-197).

4. Cross-examining the plaintiff as to answers that were stricken from the record in the first trial, then commenting on the stricken material in his final argument to the jury (A. II-736-737).

5. Intentionally misreading answers of witnesses to the jury from the depositions and testimony at the first trial (Addl. A. 202).

ARGUMENT.

REASONS FOR NOT GRANTING THE WRIT

(AS TO THE DEFENDANT LAS VEGAS HACIENDA, INC.)

Petitioners have failed to show any issue as to the defendant Las Vegas Hacienda, Inc., which should merit a grant of certiorari and delay the collection of the $100,000 plaintiff's judgment. Petitioners seek to have the tail wag the dog in raising matters relating to the assessment of costs and attorneys' fees against Reese Hubbard personally ($1741.20 costs plus ⅓ appeal attorney fees), and attempts to have these unrelated issues assist them in their efforts to delay the collection of this judgment.

There is absolutely no showing in the petition that the case against the Las Vegas Hacienda, Inc. involves either (a) a conflict in decisions in the courts of appeal, or (b) any question of importance which, in the public interest, should be decided by this court of last resort.

The Las Vegas Hacienda, Inc., is asking this court to grant certiorari to review findings of fact by two district court trial judges, which findings were affirmed by the Court of Appeals. In addition, they seek to have certain evidentiary rulings reviewed by this court.

The arguments of the Hacienda for granting the writ fall into three categories:

1. That somehow the Hacienda was prejudiced because the courts below had reviewed other cases where their attorney, Mr. Hubbard, had been found guilty of professional misconduct.

The cases cited in the petition refer to criminal charges wherein prior criminal acts are shown to indicate guilt in

a criminal case. These bear no relevance to the present case where the court below merely reviewed the other cases involving Mr. Hubbard to show that his conduct is not inadvertent or unintentional. As a matter of fact, the Illinois law on misconduct of trial counsel has been established by the repeated abuses of the judicial process by Mr. Hubbard. The opinion below accurately reviews the numerous instances wherein Mr. Hubbard has been criticized for his trial misconduct. The misconduct falls into the same categories as are found in the instant case (A-28). As Judge Robson points out in his new trial opinion, the new trial was granted "*solely from its own observation of defense counsel's tactics,* irrespective of the citation of similar action by the Illinois courts occasioned by the same counsel's conduct in the same regard." He held that these other acts did, however, "furnish corroboration that his acts were not mere happenstance, inadvertently and unintentionally occurring." (A. 11-12.) Even if no other cases had been involved, the acts in this case were sufficient to prejudice the plaintiff.

Although counsel for defendant now asserts that review of his conduct in other cases is prejudicial, we note that he filed lengthy pleadings in response to our motion for costs in which he supplied 13 affidavits of judges concerning his proper conduct in other cases (A. I-125-137).

2. That the new trial should not have been granted because there was no "objectionable trial strategy" and that it was granted because the court below didn't like the "verdict or the successful attorney."

This court has held on repeated occasions that new trial orders are discretionary with the trial court and will not be reviewed except for extraordinary circumstances. *U. S.* v. *Johnson,* 327 U. S. 106, 111; 90 L. Ed. 563, 565 (1946); *Texas & Pac. Ry. Co.* v. *Harvey,* 228 U. S. 319; 33 S. Ct.

518; 57 L. Ed. 852 (1913), particularly when the new trial order was affirmed by the Circuit Court of Appeals. The misconduct was so clearly established in this case that the trial court saw fit to tax costs against Hubbard personally. This action certainly indicates the attitude of the courts below as to the nature and extent of the misconduct of Hubbard and its effect on the outcome of the trials. We submit that the validity of Judge Robson's new trial order is conclusively shown when the different results of the two trials are considered: a not guilty verdict in the first trial and a $100,000 verdict for the plaintiff in the second trial. The findings of fact as to the misconduct of Reese Hubbard should not be reviewed here. The rule was correctly stated by Justice Jackson in *Graver Tank and Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U. S. 271, 275; 93 L. Ed. 672 (1949):

> "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

3. That the hearsay consisting of alleged conversations between plaintiff's husband (not a party to the case) and a maid and telephone operator, employees of defendant, not in the presence of the plaintiff, should have been admitted as evidence.

The evidentiary rulings in this case have now been identical in two trials and affirmed without comment in the Circuit Court of Appeals. This court has repeatedly stated that it will not review evidence or inferences drawn from evidence. *Appalachian Power Co.* v. *Amer. Inst. of Certified Public Accountants*, 80 S. Ct. 16, 4 L. Ed. 2d 30 (1959); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175; 50 S. Ct. 849; 82 L. Ed. 1273 (1938); *Houston*

Oil Co. v. *Goodrich,* 245 U. S. 440, 38 S. Ct. 140; 62 L. Ed. 385 (1918).

In addition, a review of the rulings of the courts below would be a review of rulings which excluded evidence and would be contrary to this court's decisions in *Lavender* v. *Kurn,* 327 U. S. 645; 66 S. Ct. 740; 90 L. Ed. 916 (1946); *National Labor Relations Board* v. *Donnelly Garment Co.,* 330 U. S. 219; 67 S. Ct. 758; 91 L. Ed. 854 (1946); *Michelson* v. *U. S.,* 335 U. S. 469; 69 S. Ct. 213 (1948).

In addition to the foregoing, under the statute and the rules the Court of Appeals and this court do not review evidentiary matters where substantial justice has been done. Title 28, U. S. C., Sec. 2111; F. R. C. P. Rule 61.

In view of the numerous occasions that petitioners make reference to this hearsay evidence we feel compelled to review the record in connection with these matters. It should be noted that the offered testimony of alleged conversations between the plaintiff's husband (not a party to this suit) and the employees of defendant hotel were outside the presence of the plaintiff.

A. *Dixie Tracy*—The defendant's telephone operator was supposed to have had a conversation with Carl Kiefel consisting of an alleged 14 telephone calls to his room between 2:00 A. M. and 6:15 A. M. on the morning of this occurrence. He was supposed to have said that his wife and he had had words and that she put the chain on and he couldn't get in the door.

At the first trial before Judge Robson defendant did not even make an offer of proof as to this testimony, an absolute violation of the good faith in impeachment rule. Cleary, *Handbook of Illinois Evidence,* 2d Ed., Sec. 9.11, p. 144, *Neusus* v. *Sponholtz,* 369 F. 2d 259, 260-261 (7th Cir. 1966).

At the second trial it was discovered that defendant

could not lay a proper foundation for the admissibility of such testimony (Addl. A-208; A. II-610) and it was excluded on that further basis (A. II-610; Addl. A. 208). This purported telephone conversation of a person constantly in the employ of the defendant was never reported to the police (Addl. A. 157-158) and also directly conflicts with the other hearsay testimony that the defendant attempted to introduce, that of the maid, Willie Lee Carpenter. Plaintiff's husband was alleged to have told Willie Lee Carpenter that his wife was to leave the door open for him (A. II-604); an entirely inconsistent and different story from the husband and wife argument offered by Mr. Hubbard's other witness.

In describing the incident both of these hearsay witnesses also contradicted themselves on what Mr. Kiefel was supposed to have been wearing on the night of the occurrance. Carpenter stated he was wearing a suit with matching pants (A. II-606) whereas, Tracy stated that the caller had on a gold alpaca sweater and beige slacks (Addl. A-221).

2. *Willie Lee Carpenter*—Mr. Kiefel's alleged statement to the maid, Willie Lee Carpenter, was offered at both trials and excluded as hearsay evidence by both district court judges. It is interesting that the maid was interviewed by two police officers on the morning of this occurrence and their reports were admitted in evidence in this case (A. I-688; A. II-820). She mentioned nothing to either of the officers about an alleged statement by Mr. Kiefel that his wife was to leave the door open. Under the circumstances that the Carpenter testimony was submitted the trial judges properly exercised their discretion considering the lack of verity and reliability of the statements. *Kaminski* v. *Meadows,* 264 F. 2d 53 (7th Cir. 1959); *Kenosha Auto Transport Corp. v. Lowe Seed Co.,* 362 F. 2d 765 (7th Cir. 1966).

The only theory offered at the trial stage for the admissibility of the Carpenter testimony was the joint contract theory (A. I-614). The other theories offered were an afterthought raised on appeal. This joint contract theory was rejected by the trial court first because the husband was not the agent of the plaintiff, his wife, with respect to her locking her hotel room door. *Fortney* v. *Hotel Rancroft,* 511 Ill. App. 2d 327, at 333 (1955). Secondly, it was rejected because this arrangement was inconsistent with and contrary to the position of the defendant that there was no contract between the husband and wife and the hotel. Moreover, this contract was alleged in Count II of the plaintiff's Complaint and dismissed from the case on motion of the defendant (A. II-3).

In addition, the making of such statements is generally not within the scope of the authority of agents. *Hodgersen* v. *St. Louis & St. Paul R. R. Co.,* 160 Ill. 430 (1896) and *Baier* v. *Selke,* 211 Ill. 512 (1904).

The petition fails to apprise the court of the undisputed testimony of Donna Kiefel that on the way back to her hotel room from the Casino she was followed by a strange man which caused her fear (A. II-220-222). This intervening fact was unknown to her husband, Carl Kiefel, who was in the Casino. Not only is it illogical for a woman to leave her hotel room unlocked but it is all the more illogical for a woman so to do who has been followed to her room by a strange man whom she fears (A. II-221).

Finally, if the defendant's offer of proof as to the Carpenter testimony was indicative of a plan, it would be fundamental that the evidence show some connection of the plaintiff to the plan, that is, her agreement to leave the door open, her acquiescence or knowledge of such a plan (A. II-604). The difficulty with this kind of hearsay evidence is clearly described in Cleary, *Handbook of Illinois*

Evidence, 2d Ed., Sec. 17.27, "Spontaneous Declarations: Intent As Proof of Doing Act Intended." The author states:

> "The argument for admissibility is that persons who intend to do an act are more likely to do the act than are persons without the intent, and therefore the evidence of intent is relevant. At this point, however, some logical difficulty arises. The declaration of intent as evidence is subject to two weaknesses: (1) the trustworthiness of the declarant; and (2) the possibility of change of mind or supervening events to defeat the plan."

The facts contained in the voluminous police investigation file which both parties obtained in the discovery proceedings contained no statement from the long interrogation of the husband of any plan of his or his wife's for her to leave the door unlocked. Scientific evidence of the police shows clear marks of a forced entry with fresh paint chips on the floor by the door. Although the defendant had Art Tettinger, a Las Vegas locksmith, examine the door and lock on the morning of the occurrence at the time the police were there and had him listed on the pre-trial order, they saw fit not to produce him at either trial and produced no evidence contrary to the police investigation concerning the forced entry (A. II-303-304; Addl. A. 148). Failure to produce evidence within one's control raises a presumption that it would be unfavorable. Cleary, *Handbook of Illinois Evidence,* 2d Ed., Sec. 4.16, p. 66; Gard, *Illinois Evidence Manual,* Rule 22, p. 40; *Central Waxed Paper* v. *Industrial Commission,* 32 Ill. 2d 154 (1965).

Page 38 of the petition states that Mr. Kiefel did not accompany his wife to the hospital although she was critically injured. This statement is contrary to the record which shows that he did in fact render assistance to his wife and went in the ambulance with her to the emergency room of the hospital (A. I-226). Because of normal hos-

pital regulations in the case of all persons near death, the hospital did not allow him in the emergency room.

It is clear from an examination of the record that the trial courts properly exercised their discretion in excluding this hearsay testimony.

Plaintiff was injured on March 1, 1962, over seven years ago. She, and her attorneys, have been forced to engage in extensive unnecessary litigation far beyond that normally experienced in the trial of a case as a result of the professional misconduct of the defendant's counsel, Reese Hubbard. Expenditures far and above those awarded in this case as costs have been incurred by the plaintiff. There has been extensive pre-trial discovery, countless hearings in court on preliminary motions and related matters, two lengthy jury trials, an abortive appeal to the Court of Appeals, a lengthy final appeal to the Court of Appeals, and finally, the petition for certiorari to this Court. Much unnecessary effort has been expended because of the professional misconduct of the defense counsel in this case. The time has now come for litigation to end and for the plaintiff to receive her damages as a result of her injury.

The petition for writ of certiorari as to the defendant, Las Vegas Hacienda, Inc., should be denied.

REASONS FOR NOT GRANTING THE WRIT.

(AS TO HUBBARD, THE LAWYER.)

The Court of Appeals was on solid grounds when it affirmed, with slight modification, the award of costs against Reese Hubbard. The acts of defense attorney Reese Hubbard were not minor infractions. They were serious and studied acts of misconduct calculated to interfere with the plaintiff's right to a fair trial in a civil case and to disrupt the orderly processes of justice. The Court of Appeals' opinion correctly stated (A. 30):

> "The unprofessional conduct in these two trials and in the history of Hubbard's practice as shown by prior appellate opinions is outrageous in nature."

The first trial which lasted approximately three weeks went for naught because of the defendant's attorney's professional misconduct. The plaintiff was left with expenditures for transcripts, expert witness fees, plus her attorney's time. Without an award to the plaintiff for some of these first trial out-of-pocket expenditures, the award of a new trial alone, because of the professional misconduct, is wholly inadequate to restore the plaintiff to her starting position.

The economic realities in personal injury litigation such as found in the case at bar must be considered by the court in analyzing the court's power to insure and guarantee a fair trial in a civil case where the defendant blatantly engages in professional misconduct for an obvious purpose. The defense attorney's purpose is to pulverize plaintiffs into oblivion by incurring large but unnecessary costs and expenses. The award of a new trial without any recompense to the plaintiff for the costs and expenses actually aids the defense and softens up the plaintiff for the ultimate "kill." The insurance defense lawyer such as the petition-

er herein is paid on an hourly and per diem basis. New trials and re-trials do not diminish his claim to fees and actually increase his total income. Professional misconduct is monetarily rewarding to him. At the same time plaintiffs who traditionally employ attorneys on a contingent fee basis are in a worse position after a grant of a new trial because of the costs involved and the useless and uncompensated expenditure of the time and effort of the plaintiff's attorney. Moreover, they are leery of a second trial and less able to afford one. Only by making the plaintiff whole again (by an award of costs and attorneys' fees) will the plaintiff be restored to the same starting position. Obviously, this is one of the purposes of 28 U. S. C., Sec. 1927.

ATTORNEY'S FEES AND COSTS.

The authority of a court to award costs and attorneys' fees against an attorney engaging in professional misconduct is fundamental and based on both inherent and explicit powers. It is the only realistic method of insuring a fair trial. In American law in civil litigation there is no power to award attorney's fees under ordinary circumstances. Certain exceptions to this rule exist which are germane to the case at hand. Attorneys' fees may be awarded where there is a statute governing the award or where there is a fund existing for the award or under historical equitable considerations. *Vaughn* v. *Atkinson*, 369 U. S. 527, 8 L. Ed. 2d 88, 82 S. Ct. 997 (1962). These several exceptions exist where there is no professional misconduct engaged in by the opposing party. The relevant exceptions here deal with misconduct. It has long been held that a Federal Court may award fees and costs to a successful party where a defense has been maintained in bad faith, vexatiously, wantonly or for oppressive reasons. 6 Moore's Federal Practice, Sec. 54.77, p. 1352, 1966 Ed.; Annotation:

Right to Counsel's Fees in Federal Court, Sec. 9, Fraudulent, Groundless, Oppressive or Vexatious Conduct." 8 L. Ed. 2d 849, 912-913 (1963); 20 Am. Jur. 2d Costs, Sec. 74. In *Fleischman Distilling Corp.* v. *Maier Brewing*, 386 U. S. 714, 18 L. Ed. 475, 87 S. Ct. 1404 (1967) this court recognized the existence of such exceptions authorizing the award of attorney's fees by stating:

> "Limited exceptions to the American rule have, of course, been developed. They have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result."

This inherent power was recognized in *Universal Oil Products Co.* v. *Roof Ref. Co.* (1946), 328 U. S. 575, 90 L. Ed. 1447, 66 S. Ct., 1176 (1946) where the court stated (dictum) at 580:

> "No doubt if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could be justly assessed against the guilty parties. Such is precisely a situation where 'for dominating reasons of justice' a court may assess attorneys' fees as part of the taxable costs."

In *Local No. 49 United Auto Workers* v. *American Brake Shoe Co.*, 298 F. 2d 212 (4th Cir. 1962) the court stated the principle at 214:

> "The principle that the Federal Courts have inherent power to award attorneys' fees as costs in the absence of statutory authority has been recognized where such fees have been denied, relied on where they were granted. The variety of factual circumstances in which this principle has been applied indicates that 'dominating reasons of justice' has been the guide to its application."

See also *Cleveland* v. *2nd National Bank* (6th Cir., 1945), 149 F. 2d 466, cer. denied, 326 U. S. 775, 90 L. Ed. 466, 66

S. Ct. 231 (Court held it had inherent power to award attorneys' fees in extraordinary case under theory of historical equitable powers of court).

In *Bell* v. *School Board of Powhatan County* (4th Cir., Va., 1963), 321 Fed. 2d 494, 500, the prevailing party was held entitled to counsel fees in a school integration suit. The court took into account the defendants' "long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education."

In the last term of this court by per curiam decision the court's inherent power to award attorneys' fees in the face of the defendant's bad faith conduct was again underscored. In *Newman* v. *Piggie Park Enterprises,* 390 U. S. 400, 19 L. Ed. 2d 1263, 88 S. Ct. 946 (1968) it was pointed out that attorneys' fees under the Civil Rights Act of 1964 are authorized by statute and even if the statute did not so provide would be allowed if the defendants had been guilty of oppressive or bad faith conduct and in so noting stated in Footnote # 4:

> "If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who make completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'' 6 Moore's Federal Practice, 1352 (1966 ed.)."

No court system can operate without provision for reimbursement to an aggrieved party for attorneys' fees and expenses needlessly incurred where the other party has

engaged in bad faith in the pre-trial and trial stages of litigation. The Federal Rules of Civil Procedure explicitly recognize this reality. Rule 37 provides in the case of refusal to make discovery that the court may require

> "the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorneys' fees."

Rule 56 in connection with summary judgments provides that where an offending party makes affidavits in bad faith the court may order the offending party

> "to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorneys' fees, * * *"

Even where there has been no bad faith or misconduct this court has sanctioned local civil rules for the district courts (*e.g.*, Civil Rule 4 of the U. S. District Court for the Northern District of Illinois) which provide for the payment of attorneys' fees and expenses in connection with depositions taken more than 150 miles from the courthouse. The obvious purpose of the latter cited rule and also the bad faith rule is to make whole a party whose opponent is not operating in good faith or who is in a position to assert superior economic power to prevent a fair trial.

Attorney Reese Hubbard cannot honestly claim that he is unaware of the ethical fairness standards imposed upon a trial lawyer. The case law for which he has been largely personally responsible speaks for itself. In addition, two other members of his law firm have recently had new trials awarded to a plaintiff because of their trial misconduct. *Svoboda* v. *Blevins*, 76 Ill. App. 2d 277, 279-280 (1967); *Schoolfield* v. *Witkowski*, 54 Ill. App. 2d 111, 125, 126, 129 (1964).

The petitioners claim (pp. 31-33) that the Court of Appeals had no authority to assess one-third of all attorneys'

fees in the three lengthy appeals against Attorney Reese Hubbard. Courts of appeals have recognized in numerous cases their power to award both attorneys' fees and costs in cases of frivolous appeals or in the face of reprehensible conduct. In addition to 28 U. S. C., Sec. 1912 and 1927, Rule 38 of the newly enacted Federal Rules of Appellate Procedure specifically provides that a court of appeals may award just damages and double costs to the appellee where the appeal taken is "frivolous." The case law where courts of appeal have awarded attorneys' fees and costs are directly applicable here. In *Jones* v. *Schellenberger,* 225 F. 2d 784, 794-795 (7th Cir., 1955), the defendant prevailed on appeal but because his reprehensible conduct prolonged the litigation and increased the costs, all costs and attorneys' fees were taxed against him. *In re Midland United Co.,* 141 F. 2d 692 (3rd Cir., 1944), $1,000 attorney's fees plus all costs were taxed because of such conduct. In *Lowe* v. *Willacy,* 239 F. 2d 179 (9th Cir., 1956), the court in awarding attorney's fees and costs for the frivolous appeal said (p. 180):

> "Since appellant by her own act has forced appellee to consider her brief and thereby necessarily to write his opposing brief, in affirming we adjudge to appellee just damages for his delay, 28 U. S. C. 1912, of double his costs and an amount equal to the fee paid his attorney for his services in the appeal and the amount paid for the printing of his brief . . ."

Dunscompe v. *Sayle,* 340 F. 2d 311 (5th Cir., 1965), cer. den. 382 U. S. 814, 86 S. Ct. 30, 15 L. Ed. 2d 62 (1965) (double costs were awarded). In *Ginsburg* v. *Stern,* 295 F. 2d 698 (3rd Cir., 1961), $500 attorney's fees plus costs were awarded. In *Griffin Wellpoint Corp.* v. *Munro-Langstroth, Inc.,* 269 F. 2d 64 (1st Cir., 1959), an award of double costs was made because of the frivolous and vexatious appeal and tricks (citation misquotes) engaged in by the opposing side in their brief.

In *Weiss* v. *U. S.*, 227 F. 2d 72 (2d Cir., 1955), costs against the offending attorney were suggested, cer. den., 76 S. Ct. 308, 350 U. S. 936, 100 L. Ed. 817 (1956). In *Southern Railway* v. *Gadd*, 233 U. S. 572 (1914), 58 L. Ed. 1099, 34 S. Ct. 696, a personal injury case, this court found that the defendant was guilty of filing a frivolous appeal for the purpose of delay and assessed as a penalty 5% of the amount of the judgment. *Deming* v. *Carlisle Packing Co.* (1912), 226 U. S. 102, 110, 33 S. Ct. 80, 57 L. Ed. 140 (costs plus 5% of judgment awarded).

The Court of Appeals was fully justified in assessing one-third of the appeal attorney's fees against Reese Hubbard based on the record before it. The court had new matters before it in addition to the misconduct that occurred in the first trial and was the subject of the Judge Robson order awarding fees and costs. This new matter consisted of the trial tactics of the defense lawyer in the second trial before Judge Decker, including his attempt to slip an unadmitted exhibit into the jury room concerning which all briefs devoted considerable space. Moreover, the court had before it the action of Reese Hubbard in filing an abortive and untimely notice of appeal from the new trial order some six months after the new trial order had been entered. This abortive notice was filed on the eve of the second trial and cast a cloud on the whole proceeding so that appellee was forced to incur the cost and attorneys' fees in preparing a Short Record on Appeal and filing a motion and brief in support thereof for the dismissal of this unwarranted appeal. It was clear that Reese Hubbard engaged in this action to further economically pulverize the injured plaintiff by the further incurring of unwarranted costs. Based on the foregoing record, the Court of Appeals was fully warranted in awarding the attorneys' fees, both within its inherent powers and within its powers under the applicable statutes and rules.

NO CRIMINAL CONTEMPT SOUGHT.

Petitioner premises his major attack on the award of attorneys' fees and costs for his misconduct on an analogy to the criminal contempt statute and the cases arising thereunder. The award against him for attorneys' fees and costs was not made under any civil or criminal contempt statute or proceeding. Thus, his cited authorities in connection therewith have no application here. 18 U. S. C., Sec. 401 pertains only to criminal contempt where criminal sanctions, such as imprisonment, are requested. Civil contempt, being only compensatory in nature, is not covered by this statute but is bottomed on the inherent powers of the court. *Odell* v. *Bausch & Lomb,* 91 F. 2d 359, 361 (7th Cir., 1937). The award in the case at bar was neither criminal nor civil contempt, involved no fine and no stigma of contempt. It was purely remedial since its purpose was to make the plaintiff whole again for costs needlessly and futilely expended as a result of the misconduct of Attorney Reese Hubbard.

Significantly, the federal corts in civil contempt cases have consistently held that it is proper to assess attorneys' fees and costs as a compensatory remedy to restore the injured party to his former position. The civil contempt power to award a compensatory attorney's fees is also based on the inherent judicial powers of the court. There can be no doubt that Reese Hubbard's conduct could have formed a basis for civil contempt if such had been sought. Numerous federal courts have imposed attorneys' fees and costs in civil contempts and in other cases, in the exercise of their discretion, have not imposed such remedial remedy where the facts did not warrant it but at all times have recognized their authority to so do in appropriate circumstances. In *In re Federal Facilities Realty Trust* v. *Kulp,* 227 F. 2d 657 (7th Cir., 1955) the court, in a civil contempt

proceeding, denied the award of attorneys' fees and costs to the facts involved but recognized the power to do so stating:

> ". . . All authorities seem to agree that the assessment of expenses and attorney's fees incurred in a civil contempt case against a contemnor is discretionary. The rule to be spelled out from the court decisions is that a party compelled to resort to a civil contempt proceeding to preserve and enforce an adjudicated right is entitled to a decree by way of a fine for injuries actually sustained by him because of the contemptuous act, *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 52 S. Ct. 238, 76 L. ed. 389; *Worden* v. *Searls*, 121 U. S. 14, 26, 7 Ct. 814, 30 L. ed. 853; *Nortsrom* v. *Wahl*, 7 Cir. 41 F. 2d 910; *Rivers* v. *Miller*, 5 Cir., 112 F. 2d 439, 443; *cf. Brooks* v. *United States*, 9 Cir. 119 F. 2d 636, 646-647; 17 C. J. S. Contempt, Secs. 96, 127; 12 Am. Jur. Contempt sec. 79, which may include, in the discretion of the court, an award of reasonable attorney's fees. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 426-428, 43 S. Ct. 458, 67 L. ed. 719 affirming, 7 Cir., 281 F. 488."

See Annotation 55 ALR 2d 979, "Allowance of Attorneys' Fees in Contempt Proceedings"; *Toledo Scale* v. *Computing Scale Co.*, 261 U. S. 399, 67 L. Ed. 719, affirming 281 F. 488 (7th Cir. 1923) (An award of reasonable attorneys' fees may in the discretion of the court be awarded in civil contempt); *Nelson* v. *Steiner*, 279 F. 2d 944 (CA-7, 1960); *Crane* v. *Gas Screw Happy Pappy*, 367 F. 2d 771 (CA-7, 1966) (The Court approved an award of $2,500 in attorneys' fees, expenses and damages, and also additional attorneys' fees and costs in the appeal); *Lance* v. *Plummer*, 353 F. 2d 585, 592 (CA-5, 1965) (Allowance of attorneys' fees and costs to injured party in civil contempt under the Civil Rights Act of 1964 was clearly compensatory and not improper as being punitive).

In the case of *McComb* v. *Jacksonville Papers Co.*, 336

U. S. 187 (1948) the defendant had violated the Fair Labor Standards Act minimum wage order previously entered. The trial court summarily held the defendant in civil contempt for refusal to pay the minimum wages and ordered the defendant to pay the money damages directly to the employees injured. This court upheld this use of the civil contempt penalty which was remedial in nature and required the violator to pay the damages directly to the persons harmed.

CONFRONTATION AND HEARING.

The petitioner's charge that he was denied the right of confrontation and cross-examination and evidentiary hearing in connection with the motion to assess costs and attorneys' fees is wholly without merit. The record is replete with the extended hearings, briefs, and answers filed by the defendant to these charges. Four of the charges of misconduct were contained in the plaintiff's post-trial motion before Judge Robson (A-I-26-31). To this the defendant filed two long answering memoranda, one of which is in the Appendix (A-I-42). In addition, the court held an extensive hearing at which Mr. Hubbard had an opportunity to explain his justification of his conduct (Addl' A-94-112).

The motion for taxing of attorneys' fees and costs realleged the four acts of misconduct occurring in the first trial and contained in the motion for new trial plus six additional acts of misconduct (A-I-47). On September 18, 1966, Mr. Hubbard filed a 65-page answer to this motion (A-I-84-138), plus a 13-page memorandum of authorities. Previously in his affidavit of bias he also answered (A-I-67-78). In addition, defendant filed a specification of jury demand in late September of 1966. In early October 1966 both defendants filed a further specification of jury de-

mand. The defendant offered no evidence and made no further requests to furnish additional evidence at the ruling on the motion (A-I-623, 630-632) or at the hearing on the prove up (A-I-633-662). Indeed, when one examines the acts of misconduct, they are all items which occurred in the presence of Judge Robson and during which the court heard explanations at the time outside the presence of the jury by Mr. Hubbard when he was called to answer and explain his conduct as it occurred.

It is clear that Mr. Hubbard has taken advantage of a full opportunity to explain and did present his explanation to the court on numerous occasions. Moreover, we point out to this Court that in connection with the taxation of costs and attorneys' fees under the discovery provisions of the Federal Rules these are done summarily. In Illinois, in connection with the assessment of costs and attorneys' fees against a person who makes untrue statements in pleadings, it is provided in Section 41 of the Civil Practice Act (Ill. Rev. Stat., Chap. 110, Sec. 41) that the court may "summarily" tax costs and attorneys' fees. Judge Robson did not summarily tax costs and attorneys' fees but did this after due deliberation and after the numerous hearings given to the defendant to justify his conduct.

Petitioner charges throughout his petition that he was improperly charged and found guilty of interfering with the release of the court reporter so as to prevent her appearance at trial. He charges this was based on mere speculation. Petitioner seeks to mislead the court with reference to the central issues in connection with the misappropriation and not filing of the deposition. We have clearly shown his conduct in connection with the false statements, the suppression and interference with the filing of this deposition. In addition, but not necessary for a finding in connection with the deposition suppression, was the showing of plaintiff's attorney Jacobson efforts to obtain

the court reporter to prove the deposition testimony that was wrongfully withheld. To effectively stymie the plaintiff in attempts at both methods of obtaining the impeachment tools, underscores the misconduct of secreting the deposition in the first place. We again note that the petition cites no evidence in conflict with the charge and finding that he lied to the judge about the deposition's whereabouts, his knowledge of witness' inked-in changes in the deposition and false statements as to when he mailed the deposition back to the court reporter. This basic finding is unrebutted because Hubbard had been caught in the falsehood. His only defense is to divert the court's attention from the central issue to a collateral one.

Petitioner complains that under Rule 52 of the F. R. C. P. specific findings of fact and law are required. The contrary is the case. In Rule 52(a) the last sentence specifically provides that such findings of fact and conclusions of law are unnecessary in connection with motions. Moreover, the court's written opinion is very specific on both these issues.

JURY TRIAL ISSUE.

The petitioner is not entitled to a jury trial in connection with the motion to tax attorneys' fees and costs. Petitioner's brief (p. 27) makes this charge but cites no case law in support thereof. The recent decisions concerning civil and criminal contempt powers of the court clearly circumscribe the fact there is no jury trial in connection with a motion to assess costs. In criminal contempt proceedings where the respondent may be sentenced to jail this Court has held that the respondent is entitled to a jury trial only if the sentence to be imposed is more than six months in jail, and if less than six months, then there is no right to a jury trial. *Cheff* v. *Schnackenberg,* 341 F. 2d 548 (CA-7, 1965), affd. 384 U. S. 373, 16 L. Ed. 2d 629,

86 S. Ct. 1523 (1966); *U. S.* v. *Barnett* (Governor of Mississippi), 376 U. S. 681, 12 L. Ed. 2d 23, 84 S. Ct. 984 (1964); *Bloom* v. *Illinois,* 391 U. S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477 (1968). These decisions point out that there is absolutely no right to a jury trial under any circumstances in a civil contempt citation where the remedy is remedial or compensatory and not punitive as in a criminal contempt. *Odell* v. *Bausch & Lomb,* 91 F. 2d 359, 361 (CA-7, 1937) directly held there is no jury trial right in civil contempt. Judge Robson cited in the case at bar additional cases holding there is no jury trial on an assessment of costs and attorneys' fees (A-I-627). *Empire State Ins. Co.* v. *Chafetz,* 302 F. 2d 828 (CA-5, 1962); *Spach* v. *Monarch Ins. Co.,* 309 F. 2d 949 (CA-5, 1962); *Swofford* v. *B. & W. Incorp.,* 336 F. 2d 406 (CA-5, 1964).

EXPERT WITNESS FEES.

The award of the $675 for expert witness fees dealt with the fees paid to the doctors to testify in the first trial and to the lock expert whose testimony went for naught as a result of the professional misconduct of Mr. Hubbard. In order to make the plaintiff whole and put her in the same position she would have been in had not the professional misconduct of the defense attorney prevented a fair trial, the court awarded to her those costs that were uselessly expended in the first trial and would have to be repeated in the second trial. In the extraordinary circumstances herein found there is authority that such costs be awarded.

Even in the ordinary case not involving misconduct or "exceptional circumstances" the court in its discretion may award expert witness fees not provided for by statute. This exercise of discretion will not be upset unless abused. In the case which petitioners cite on page 34 of the pe-

tition, *Euler* v. *Walker* 295 F. 2d 765 (CA-10, 1961) it was stated:

> "For compelling reasons of justice in exceptional cases allowances may be made of items of cost not authorized by the statutes."

Moreover, Justice Black stated in *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227 at 235:

> "The discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute."

Other courts have stated that in appropriate cases they have the power to tax expert witness fees. *Department of Highways* v. *McWilliams Dredging Co.*, 10 FRD 107, 109 (D. C. La., 1951); *Banks* v. *Chicago Mill and Lumber Co.*, 106 F. Supp. 234, 236 (D. C. E. D. Ark., 1950).

CONCLUSION.

For the foregoing reasons, it is respectfully prayed that each petition for a writ of certiorari as to (a) the $100,000 personal injury award against Las Vegas Hacienda, Inc., and (b) Attorney Reese Hubbard for costs and one-third appeal attorneys' fees, be denied.

Respectfully submitted,

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APPENDIX A.

STATUTES AND RULES.

1. Federal Rules of Civil Procedure.

Rule 37. *Refusal to Make Discovery: Consequences*

(a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in

opposing the motion, including reasonable attorney's fees.

Rule 52. *Findings by the Court.*

(a) *Effect.* In all actions etc., tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

Rule 56. *Summary Judgment.*

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and

any offending party or attorney may be adjudged guilty of contempt.

2. Federal Rules of Appellate Procedure.

Rule 38. *Damages for Delay.*

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

3. United States Code.

Title 28, U. S. C., Sec. 2111. *Harmless error.*

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. Added May 24, 1949, c. 139, sec. 110, 63 Stat. 105.

4. Illinois Civil Practice Act.

Section 41. Illinois Revised Statutes, Chap. 110. *Untrue statements.*

Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial.

SUPREME COURT U. S.

Office-Supreme Court,
FILED
MAY 12 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1235

REESE HUBBARD AND LAS VEGAS HACIENDA, INC.,
Petitioners,

vs.

DONNA M. KIEFEL,
Respondent.

REPLY BRIEF FOR PETITIONERS.

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THE BLAKELY PRINTING COMPANY, CHICAGO

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Respondent.

REPLY BRIEF FOR PETITIONERS.

(Answering pp. 1-2.)

Although there was no formal order of consolidation, there was a *de facto* consolidation. The cases were argued together, and decided together.

QUESTIONS PRESENTED.

(Answering pp. 3-5.)

The issues are correctly stated in the Petition, pp. 1-7.

Can a district judge summarily enter judgment for $8,171.56 against a trial lawyer for the benefit of opposing counsel? Such summary recovery against a lawyer without statute or rule is unheard of in Anglo-American law, and should be reviewed by this Court.

In any system of jurisprudence based on the rule of law, summary punishment, that is punishment without a trial,

may never take place except on undisputed facts. The minute that the testimony of witnesses or other external evidence is required to sustain a charge, the power of the court to proceed summarily is lost, and all of the procedural requirements of the constitution are immediately in force.

Respondent really concedes the necessity of external evidence to sustain the charges, by attempting to cite such evidence. (pp. 12-15)

The principal charges of misconduct turn on evidence of events which took place outside "the actual presence" (F. R. Cr. P. 42a) or personal observation of the court, namely in Las Vegas, Nevada.

The attempt to justify the summary proceedings, and thereby avoid the constitutional requirements of procedural due process, on the basis of a "personal observation of the court" exception utterly fails. If left to stand, the instant opinion would make a nullity of the very important constitutional inhibitions aganst *ex parte* evidence, and the very fundamental constitutional requirements of confrontation, cross-examination and a factual hearing.

STATEMENT OF THE CASE.

(Answering pp. 6-16.)

The facts are correctly stated in the Petition, pp. 6-16.

Respondent is inaccurate in the following particulars:

(Page 7). "The door automatically locked when it was closed" only if a button were turned to the lock position. (A. I 186; A. II 461-462) Otherwise, the door could be opened from the outside.

One of the most disputed issues of the case was whether Donna Kiefel left the door unlocked for her husband, as he had directed when she left the casino. (A. I 479, 521, 560, 614; A. II 546, 604) Donna Kiefel herself did not

remember at the first trial if she had locked the door. (A. I 189)

(Pages 7-8) The investigation of the Clark County Sheriff's Office showed only that at some time someone "attempted" to shimmy the lock. (A. I 593; A. II 126, 127, 496)

(Page 8) Defendant's expert testified the door could not have been *forced.* If it had, the soft aluminum catchplate and strikeplate *"would have had to be destroyed."* (A. II 456). Hence, it was his opinion that the lock was never forced. (A. 456)

(Page 8) The contemporary medical records show Donna Kiefel was competent to make the numerous admissions that she left the door open. (A. II 787-788, 791-792, 800-806) Repeatedly, those records show Mrs. Kiefel was "coherent", "lucid", "alert", "oriented and rational." (A. II 800-806)

(Page 8) That one of the five persons to whom Donna Kiefel admitted she left the door open later disowned her contemporary police report (A. II 808) by saying, "I got together a story for the report" (A. II 652) proves nothing in respect to defendant, or its counsel.

(Pages 8-9) There were no innuendos or insinuations in the opening statement. We flatly stated we would prove Kiefel's admission to the telephone operator of his fight with Mrs. Kiefel. But for erroneous rulings by the trial court we would have presented this evidence. (See Petition, pp. 11-12, 37-39)

The operator's evidence corroborated other important evidence of Carl Kiefel's complicity in the crime, namely, (1) that after the occurrence he was found with blood around his wristwatch and the soles of his shoes (A. 663); (2) that he rendered his wife no assistance; and (3) that despite direct orders from the security officer Prolle, not to touch anything so as to destroy fingerprints, Carl Kiefel immediately grabbed the assault weapon and carried it to

the bathroom, thereby destroying the fingerprints. (A. II 98, 603, 613)

The first trial judge correctly said that the first critical issue of the case was: "Who inflicted the injuries, her husband or an intruder?" (A. 11) Failure of the second trial judge to permit consideration of this issue in the case may well account for the different verdicts reached.

(Pages 10-12) The facts and matters relating to charge II (Sharon Hamlin) are stated in Petition, pp. 13-14. See also p. 18, *infra* concerning the whereabouts of the original deposition.

Mrs. Hamlin was a very pedantic person who made certain meaningless changes and interlineations on the original of her deposition. During the first trial plaintiff's counsel Brandvik cross-examined her at length about those changes. (A. 519-522) Further, Reese Hubbard informed the court on November 9, 1965, a week before the trial started, that she was insisting on certain changes. (A. 349)

Thus, Respondent is not being fair with this Court in stating that such changes were "all unknown to plaintiff's counsel." (Brief, p. 10) Nor is he being fair with the Court in suggesting either that Hubbard procured the changes or tried to conceal them. (Brief, pp. 10-13)

None of the changes are in any way impeaching. At trial plaintiff's counsel described them as simply "questions of semantics." (A. II 547)

In all, there were only 15 changes in her entire 52-page deposition. (A. II 31, 33, 35, 36, 38-40, 49, 50, 54, 57, 61, 63) They eliminate only 25 words of the original transcript of the deposition. Aside from corrections of obvious errors of grammar and typing and elaborations of answers given, the "changes" relate almost entirely to negativing any inference that at 2:00 a.m., March 4, 1962, plaintiff "came to" or "regain[ed] consciousness" for the first time since the occurrence three days before. She simply "awoke." (A.

II 33, 35, 36, 38, 44, 50) Since Sharon had not previously treated plaintiff, she would not have personal knowledge of plaintiff's previous condition. (A. 516)

These changes which she made accord with the hospital records. (A. II 545) Those records, quoted at Def. Br. 9-11, use the terms "coherent" and "alert" on March 3, the day before the interview. (A. II 787, 792-794) The record of March 4, 1968, the day following the interview, shows plaintiff was "lucid at all times," "responds well when spoken to," and using "normal sentences." (A. II 787, 795)

The changes from "conscious" and "unconscious" to "awake" and "asleep" do not impeach Sharon Hamlin, and were fully described in the first trial. (A. 519-522)

A second change of "brain injury" to "head injury" (A. II 40) was also admitted in the first trial. (A. 521) Sharon Hamlin was not a doctor. It would be consistent with her training to use more neutral terms, leaving diagnoses to properly qualified physicians. There was no issue on the point.

Her remaining changes can be observed at pages 3, 13, 14, 23, 27, 35, 38, and 44 of the deposition. (A. II 31, 39, 46, 49, 54, 55, 57, 61, 63) They were completely inconsequential.

That plaintiff's counsel was not prejudiced by not having these "other changes" in hand for cross-examination at the first trial is conclusively shown by the fact that he did not cross-examine about them at the second trial. There, his only cross-examination was about the changes made by Sharon Hamlin to show (1) Mrs. Kiefel had been "asleep," rather than "unconscious," that she "awoke," rather than that she "came to" or "became conscious" for the first time since the occurrence, and (2) that she had a "head injury," rather than a brain injury. (A. II 546-551)

Those changes had been described by her to plaintiff's counsel during the first trial. (A. 519-521)

(Page 12) Re the "fight" between the Kiefels on the night of the assault.

Under the authorities relied on, Petition, pp. 11-12, 37-40, Tracy's evidence was admissible substantively, so that there was no occasion to lay an impeaching foundation.

(Page 12) There was no necessity for defendants to bring in witnesses to attest the verisimilitude of the door replica, since plaintiff (A. 194-195) and her then husband (A. 262) admitted that it correctly showed the operation of the lock and chain. The trial court ruled the interrogation proper. (Add. A. 31-33) When Kiefel finished testifying, the Court suggested its removal from the courthouse. (Add. A. 37)

(Page 15) The record relating to the *Singleton* charge is stated in Petition, pp. 14-15. Butterfield did state on cross-examination, when she was not being led by plaintiff's counsel, that she talked to the girl, rather than Jacobson. (A. 665) It is simply not true that Singleton was personally present at the Bell or Hamlin deposition taken by Frank Hall of Chicago, Mr. Hubbard's partner. A review of the two depositions fails to show his presence. (Reply App. 10-23) The depositions were merely taken on Singleton's premises by Mr. Hall. When Bell could not produce a certain tape, he was asked if he would telephone the Singleton office, "where we are now sitting" in the event he found it. (Reply App. 22)

We could have asked Bell to write us in Chicago about the tape if he found it, but he had never answered our previous correspondence. (Reply App. 18-19)

It is doubtful Singleton or anyone in his office ever knew of the request, since no one has ever found the alleged tape.

No evidence supports the court's finding that Singleton had been "retained . . . to represent defendant in [a] deposition taken in this case." (A. 40-41)

(Page 14) We do not suggest plaintiff should have "intervened" to obtain an affidavit from Singleton. Our position is simply that this entire piecemeal affidavit procedure, supplemented by *ex parte* inferences from other cases, is not a substitute for the "evidentiary hearing" required by the constitution, at which Singleton, Butterfield, Hubbard and Jacobson could be examined and cross-examined. (See Petition, pp. 20-26)

(Pages 14-15) There was no misconduct on our part in respect to the Witte deposition. Our objection at trial was simply that no order had been entered authorizing the deposition. (Add. A. 42) The deposition, however, was taken in Las Vegas without objection on the part of Frank Hall, the attorney attending the deposition. (A. I, 349-355) Nor did defendant move to quash the notice. (Add. A. 61) On these facts the court could easily have ruled one way or the other as to whether it would permit the deposition, already taken, to be read.

The lengthy hearing at which Hall and plaintiff's counsel Brandvik gave testimony showed no more than that the Witte deposition was taken without either agreement or objection. (Add. A. 68) Brandvik did not support the claim made here (Brief, p. 14) of an agreement to take the deposition.

(Pages 14-15) The remainder of the objections relating to the first trial are without merit. They fail to cite evidence. Respondent's record references are simply to their own pleadings or motions below.

The trial court correctly ruled, at the hearing on costs, that defendant was not required to stipulate that the physical exhibits 52A and B, which were found on the eve of trial after being long lost, were, in fact, the actual lock. (A. 660)

That we did not later at trial object to their introduction did not make it an act of bad faith on our part not to stipulate to their authenticity.

(SECOND TRIAL.)

(Page 15.)

1. Hubbard did not attempt to "slip" into the jury room an exhibit which had been denied admission on repeated occasions. (Add. A. 205-206) Defendant's exhibit 7, reproduced at A. II 827, was the 26th page of the lengthy, rather illegible hospital record. (44 pages) (A. II 786-805)

It was properly admitted as an exhibit in the first trial and was so marked. (A. 539) *Bartosh* v. *Ryan,* 344 Ill. App. 214, 219-220, 100 N. E. 2d 330 (1951). The exhibit was also sent to the jury room.

At the second trial the court failed to follow the ruling of the first judge. (A. II 539) The record, however, does not show that the exhibit was ruled on "on repeated occasions," as counsel suggests. (Brief, 15) We find but one ruling. (A. II 539) Hubbard's stated reason for including that exhibit in the group to be sent to the jury room in the second trial was stated as follows: "I understand that that is in evidence." (A. II 759; R. II 1348)

In a record running at that point to 1342 pages, with courts making differing rulings as to the same evidence it is understandable how a lawyer assembling a multitude of exhibits at the end of a case, might fail to recall which judge had ruled which way on each piece of evidence.

2. There was no bad faith in filing the notice of appeal from the new trial order as a part of the separate appeal from the costs judgment. The order granting a new trial was interlocutory. But, when plaintiff's counsel induced the trial court to enter the final "costs" judgment (A. I 141),

the order granting the new trial became reviewable on appeal. (See authorities cited in our Brief in Opposition to Plaintiff's Motion to Dismiss, Reply Appendix, pp. 27-31)

Moore's Federal Practice, 2d Ed., Vol. 6 (1965) § 59.15(1), pp. 3896-3897; *Conney* v. *Erickson* (1963, 7th Cir.), 317 F. 2d 247; *Kanatzer* v. *Chrysler Corp.* (1952, 10th Cir.), 195 F. 2d 104; *Berner* v. *British Comm. Pac. Airlines* (1965, 2nd Cir.), 346 Fed. 2d 532, *cert. den.* 382 U. S. 983; *Marshall's U. S. Auto Supply* v. *Cashman* (1940, 10th Cir.), 111 F. 2d 140; *Pettingell* v. *Fuller* (1939, 2nd Cir.), 107 F. 2d 933; *Standard Oil Co.* v. *Brown* (1956, 5th Cir.), 238 F. 2d 54.

Since the Seventh Circuit had stated in *Conney* that a new trial order could be reviewed incidentally to "an appeal from a final judgment *or any other appealable order*" (317 F. 2d 247, 248) (emphasis ours) we believed in good faith the Court of Appeals had jurisdiction. Indeed, had the Court followed *Conney* it would not have dismissed that appeal.

3. (Pages 15-16) Ward Halstead is not a physician, and hence not required to be called "Doctor." The Court may note the number of Ph. D.'s who do not use the term.

4. (Page 16) There was no error in regard to Donna Kiefel's admissions at the first trial that nothing was stolen from her purse. (See Petition, p. 30) (A. I 196) That the admission was subsequently stricken at the first trial is of no moment. Under Illinois law, "any statement of a party no matter when or where made is admissible as an admission." 18 Illinois Law & Practice, Evidence, § 131, pp. 262-263. Cleary, Handbook of Illinois Evidence 280, § 17.11 (2d ed. 1963), citing also, *Susemiehl* v. *Red River Lumber Co.*, 306 Ill. App. 430, 435, 28 N. E. 2d 143 (1940), aff. 376 Ill. 138, 33 N. E. 2d 211 (1941). The court simply misapprehended the evidence point.

REASONS FOR GRANTING THE WRIT.

(As to Hubbard, the Trial Lawyer.)

Reese Hubbard denied each of the charges of misconduct and claimed the right to see and cross-examine the witnesses against him. (A. 84-85, 91, 93-94)

He attached the affidavits or statements of thirteen sitting judges before whom he had tried cases as follows: five (A. 125); fifteen (A. 126); thirty-five (A. 127); thirty-five (A. 128); eight (A. 129); fifteen (A. 130); thirty (A. 131); thirty-five (A. 132); fifty (A. 133); seventeen (A. 134); eight (A. 135); thirty-five (A. 136); nine (A. 137). Each judge unqualifiedly vouched for his proper conduct.

The question now is can counsel by name calling and vituperation justify the denial of Reese Hubbard's right to see and cross-examine the witnesses against him and to offer evidence in his own behalf?

In *Willner* v. *Committee on Character & Fitness* (1963), 373 U. S. 96, 106; 10 L. Ed. 2d 224, 231, Willner had been denied a license to practice law. He showed that he was never afforded an opportunity of confronting his accusers, of cross-examining them and refuting them. This Court said: (p. 106)

> "We hold that petitioner was denied procedural due process when he was denied admission to the Bar by the Appellate Division without a hearing on the charges filed agianst him before either the Committee or the Appellate Division."

As stated by Mr. Justice Black in *re Oliver* (1948), 333 U. S. 257, 273, 92 L. Ed. 682, 694:

> "A person's right to a reasonable notice of a charge against him and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against

him, to offer testimony and to be represented by counsel."

Plaintiff's simplistic, *ad hominem* argument for fees (pp. 15-16) completely avoids this critical question.

A. Confrontation and Hearing.

(Answering pp. 34-36.)

Hubbard's right to see and to confront witnesses on the contradicted factual issues and to present opposing witnesses is fully established by the authorities cited in the petition, pp. 20-26.

Willner v. *Committee on Character & Fitness,* 373 U. S. 96, 103, 105, 83 S. Ct. 1175, 10 L. Ed. 224, 229, 231 (1963); *In re Oliver,* 333 U. S. 257, 259, 273, 275, 92 L. Ed. 682, 694, 695 (1948); *Greene* v. *McElroy,* 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959). See also *Berger* v. *Calif.,* 37 U. S. Law Week 3247, 89 S. Ct. 540, 541 (1969); *Barber* v. *Page,* 390 U. S. 719, 721, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255 (1969); *Pointer* v. *Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

None of these cases suggest that this valuable constitutional right may be cavalierly swept aside simply by changing the name of the proceeding to "costs" or by making the award payable to opposing counsel rather than the government as a fine.

More important, none of these important decisions accept respondent's argument (pp. 34-36) that a legal hearing concerning whether an "evidentiary hearing" is required can be a constitutional substitute for an "evidentiary hearing." Indeed, in the following decisions this Court has repeatedly refused to accept that line of argument. *Townsend* v. *Sain,* 372 U. S. 293, 312-313, 9 L. Ed. 770, 787-788, 83 S. Ct. 745 (1965); *Smith* v. *Yeager,* 21 L. Ed. 2d 246, 248, 89 S. Ct. 277, 278, 393 U. S. 122, 123 (1968)

It is simply not true (p. 35) that petitioner failed to object at the hearing on damages to the lack of a constitutional hearing on damages. (A. I 633, 634)

Nor is it true (p. 35) that all of the matters occurred within the "actual presence" personal observation of the court, so that evidence was unnecessary. F. R. Cr. P. 42(a). The principal charge, of preventing the Las Vegas reporter from coming to Chicago, turned on evidence of events which occurred in Las Vegas. (See Petition, pp. 19, 23, 24) The law is clear that when a court must "depend on statement made by others for his knowledge of these elements . . . "jurisdiction to proceed summarily is lost. *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 695, 68 S. Ct. 499 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925).

For the reasons stated in Petition, pp. 24-26, specific findings were required. The opinion of Feb. 28, 1966 granting the new trial is inadequate to constitute the findings required to be contained in the judgment of October 24, 1966, F. R. C. P. 52. This is most particularly so since the petition for costs and attorney's fees added additional charges of misconduct not urged in the motion for a new trial. *In re Ruffalo,* 390 U. S. 544, 88 S. Ct. 1220, 20 L. Ed. 2d 117 (1968). As this Court there observed, the addition of new charges after the hearing voids the proceeding.

B. Contempt.

(Answering pp. 32-34.)

Petitioner misses the entire point of our contempt argument (pp. 16-18). It is simply that the contempt statute, 18 U. S. C. § 401, and the procedural limitations of rule 42 (F. R. C. P. 42) state the outer limits of a court's authority over a trial lawyer in his representation of his client. Were the opinion of the Court below allowed to stand, that statute and rule would be effectively nullified.

None of the decisions (pp. 32-35) cited is relevant. None involved an action against a trial lawyer. Further, none suggest that by changing the title of the proceeding from criminal to civil, the important constitutional requirements of notice, cross-examination, hearing and findings may be avoided.

If the cost proceeding be regarded as a prosecution for civil contempt the case law is clear that Hubbard had a right to be confronted by the witnesses and to cross-examine them. (See Petition, p. 29). In *Cohn* v. *Kramer,* 136 F. 2d 293, 295 (C. A. 6, 1943), the Court stated:

> "In a civil contempt proceeding for violation of a decree, the respondent is entitled to opportunity to controvert the charges against him; and when he denies the charges, the burden rests upon the petitioner to prove by evidence that the decree has been violated. If the facts alleged as violation are neither admitted nor proven, the respondent may not be adjudged in contempt. This is elementary law."

The fifth and eighth circuits have made similar holdings in *N. L. R. B.* v. *Whittier Mills,* 5 Cir., 134 F. 2d 725, 728; *N. L. R. B.* v. *Rath Packing Co.,* 8 Cir., 123 F. 2d 684, 685.

Hubbard's important constitutional rights are not to be disregarded simply because they are procedural. Justice Holmes correctly observed:

> "In the development of our liberty procedural law has been a large factor." *Burdean* v. *McDowell,* 256 U. S. 465, 477, 41 S. Ct. 1048, 1051, 65 L. Ed. 1048, 1051.

Similarly, Justice Frankfurter:

> "It is not for nothing that most of the provisions of our Bill of Rights are concerned with matters of procedure." (*Sacher* v. *United States,* 343 U. S. 24, 25, 96 L. Ed. 717, 722)

ATTORNEY'S FEES AND COSTS.

(Answering pp. 26-31.)

For the reasons stated in Petition, pp. 30-31, the unsolicited award against Reese Hubbard personally of one-third of all of the plaintiff's attorney's fees in the three lengthy appeals should be reversed. The judgment from which the trial lawyer, Hubbard, appealed was a novelty in Anglo-American jurisprudence.

On appeal it was reduced from $8,171.56 to $1,741.20 by eliminating plaintiff's attorney's fees in the trial court. In no sense could the appeal of Hubbard, the trial lawyer, be said to have been vexatious or prosecuted for delay.

Under the authorities cited in our Petition, pp. 31-33, the power to award attorney's fees on appeal is limited to cases where the judgment has been affirmed or the appeal dismissed as frivolous. Cf. 28 U. S. C., § 1912 ("Where a judgment is affirmed * * *") When the judgment is reversed or reduced, power to award attorney's fees on appeal is lost. *Globe Const. Co.* v. *Brewer,* 197 F. 2d 707, 708-709 (C. A. 5, 1952)

In the only contrary decision, to which we are cited (Brief, p. 30), *Jones* v. *Schellenberger,* 225 F. 2d 784, 794, the issue was not argued, but conceded.

For the reasons stated, *supra,* pp. 8-9, the filing by Hacienda [not Hubbard] of a notice of appeal from the new trial order as a part of its separate appeal from the costs judgment was not an act of bad faith and does not warrant imposition of costs against either Hubbard or Hacienda.

[Note: Petitioner, Reese Hubbard, was not the appellate counsel for either Hacienda or himself.]

The order granting a new trial was interlocutory. But, when counsel induced the trial court to enter the final "costs" judgment (A. I 141), the order granting the new

trial became reviewable on appeal. See authorities cited in our Brief in Opposition to Plaintiff's Motion to Dismiss, Reply Appendix, pp. 27-31.

Moore's Federal Practice, 2d Ed., Vol. 6 (1965) §59.15(1), pp. 3896-3897; *Conney* v. *Erickson* (1963, 7th Cir.), 317 F. 2d 247; *Kanatzer* v. *Chrysler Corp.* (1952, 10th Cir.), 195 F. 2d 104; *Berner* v. *British Comm. Pac. Airlines* (1965, 2nd Cir.), 346 F. 2d 532, *cert. den.* 382 U. S. 983; *Marshall's U. S. Auto Supply* v. *Cashman* (1940, 10th Cir.), 111 F. 2d 140; *Pettingell* v. *Fuller* (1939, 2nd Cir.), 107 F. 2d 933; *Standard Oil Co.* v. *Brown* (1956, 5th Cir.), 238 F. 2d 54.

Since the Seventh Circuit had stated in *Conney* that a new trial order could be reviewed incidentally to "an appeal *from a final judgment or any other appealable order*" (317 F. 2d 247, 248) (emphasis ours), we believed in good faith the Court of Appeals had jurisdiction. Indeed, had the Court followed *Conney* it would not have dismissed that appeal.

Further, it is certain that plaintiff's counsel did not devote one-third of their time on all three of these lengthy appeals to filing their successful motion to dismiss Hacienda's notice of appeal from the new trial order. That matter was disposed of quite summarily.

EXPERT WITNESS FEES.

(Answering pp. 37-38.)

For the reasons stated in Petition, pp. 33-34, and under the authorities there cited there was no authority for the award of expert witness fees from the first trial. *Henkel* v. *Chicago, St. Paul, U. & O. Ry. Co.*, 284 U. S. 444, 52 S. Ct. 223, 76 L. Ed. 386 (1932); *Motion Picture Co.* v. *Steiner*, 201 F. 63 (C. A. 2, 1912) (No such authority even if opposing counsel's conduct is vexatious.) *Green* v. *American Tobacco Co.*, 304 F. 2d 70, 77 (C. A. 5, 1912); *Euler* v.

Waller, 225 F. 2d 765, 766 (C. A. 10, 1951); *Marquez* v. *American Export Lines,* D. C. N. Y., 1967, 41 F. R. D. 386. These latter decisions have been express that a district court lacks such authority, at least in the absence of advance application before employment of the expert.

None of the decisions cited (p. 38) is in point. In none were expert witness fees allowed.

The judgment for $675.00 in expert witness fees from the first trial should be reversed.

REASONS FOR GRANTING THE WRIT.

(As to the Client, Las Vegas Hacienda, Inc.)

(Answering pp. 17-24.)

1. Hacienda's petition should be granted because of the unconstitutional use against it of matter dehors the record in the form of *ex parte* statements from cases in which it was neither a party, nor in privity with a party. (See Petition, pp. 34-35) *Hansberry* v. *Lee,* 311 U. S. 32, 40-41, 85 L. Ed. 22, 26, 61 S. Ct. 115, 132 A. L. R. 741; *Kolod* v. *U. S.,* 390 U. S. 136, 138, 19 L. Ed. 2d 962, 964, 88 S. Ct. 752 (1968). (All emphasizing the importance of an "adversary," "evidentiary" determination of all issues in a case.)

Similarly, even if the barrier of lack of privity could be overcome, the decision is in conflict with the line of authority barring use of past offenses to show a general disposition to commit offenses, and hence to commit the particular offense charged.

Respondent cites no authority in support of either action of the courts below, but merely suggests that these actions were in some way not prejudicial.

The use by the two courts below of admittedly improper matter was so explicit, that, apart from the issue of prejudice, the opinion should be reviewed to prevent its use as precedent to erode valuable constitutional rights.

Respondent's want of prejudice argument (p. 18) is that the improper matter dehors the record played no part in the court's findings of misconduct, but that it merely fortified their feelings of outrage. Respondent quotes (p. 18) the trial judge as stating that all of his findings were based on "its own observation." (A. 11-12)

The patent impossibility of this statement is elsewhere shown. (See pp. 2, 12, *supra*) The court could not possibly have had any "personal knowledge" of the events which took place in Las Vegas, Nevada on November 16, 1966, to cause attorney William Singleton to refuse to release reporter Stella Butterfield to come to Chicago to testify on November 17.

The only *evidence* in the record as to why Singleton or his office refused to reschedule his deposition was his statement to Butterfield that "it was a very important case." (A. I 665) Nothing contradicts Singleton's statement.

[Note: If it was not in fact "a very important case," Butterfield, the reporter, could easily have so stated, when plaintiff later took her deposition.]

The court could not possibly have had any personal knowledge based on "its own observation" as to whether Singleton was being truthful in stating that "it was a very important case." (A. I 665)

There was no contrary evidence whatever on this issue. (See Petition, pp. 14-15) In these circumstances the basis of the finding of impropriety in this matter by the two courts below must result from their general mistrust of Hubbard, an attitude which long antedated, and had its origins outside this case against your petitioner, Las Vegas Hacienda, Inc.

Similarly, in the case of each of the other two charges of misconduct relied on below it is impossible that the findings

were not based essentially on the admittedly improper matter from other cases.

As to Charge 2, by the court, of failing to file the original of the Hamlin deposition "in violation of the rules of court" (A. 10), respondent now concedes (Brief, p. 10) that it was not Hubbard's, but the Las Vegas reporter Butterfield's duty to file the deposition. Hubbard could not have filed the uncertified deposition. F. R. C. P. 30.

Rather, Hubbard is charged by respondent (p. 10) and by the Court of Appeals (A. 20) with making false statements concerning its whereabouts to conceal that Hamlin had made changes on its face. But Hubbard advised the court more than a week before she testified that she was insisting on changes (A. I 349) and she herself was cross-examined about them. (A. I 519-522) (See pp. 4-6, *supra*) Further, Hubbard's account of the whereabouts of the deposition was corroborated not only by Hamlin, but by the factual assumption of plaintiff's counsel's interrogation at the second trial. (A. II 552)

Respondent is completely in error (p. 10) in asserting that Hubbard did not return the deposition to Butterfield until four months after trial. What happened at that time is that Butterfield presented it a second time to Hamlin for signature and again received it back. (A. II 552, 781-2) This matter was all clarified by plaintiff's counsel during the second trial, by leading questions which assumed the correct state of facts. (A. II 552)

Normally, a lawyer's statement of fact during a trial is taken at face value. The ready rejection of Hubbard's factual statements by both courts below must have its origin outside the record in the admittedly improper matter considered by both courts.

To read the trial court's opinion on Charge 1 (the opening statement), one would gather that the operator Tracy,

whose testimony was promised in the opening statement, was in Las Vegas during the entire trial, rather than in Chicago, in the witness room, prepared to testify. (A. II 609, Add. A. 100) If she had testified, she could have substantiated the opening statement, and impeached Kiefel. (A. 276) Under the court's erroneous evidence rulings, however (A. I 277, 558-559), to present her as a witness to give evidence of Kiefel's declaration that he and his wife were having a fight and that she had put the chain on, would have been an empty gesture and disrespectful of the court.

The finding by the court of improper motive in failing to present Tracy as a witness could not have been based "personal observation," but, again, must have been based on the courts' long-standing general mistrust of Hubbard, arising out of the admittedly improper, *ex parte* matters dehors this record. Indeed, the trial court admits that its finding of improper "intent" in this regard was based in part on the past cases, to which this defendant was not a party.

"As to the other causes involving counsel, the court states merely that they cast *some illumination* on counsel's possible intent in the trial tactics employed." (A. I 629)

But, a finding of improper intent had to be the sole basis of this finding of "improper trial tactics." Absent such a finding of improper motive in failing to present the witness, Tracy, the rule comes into play that there is no impropriety in failing to present evidence, if such proof has been precluded by the effect of a court's evidence ruling. *Gideon* v. *Williams,* 336 Ill. 482, 489-490, 168 N. E. 514.

Because of the courts' extensive reliance on admittedly improper matter dehors the record, from other cases in which your petitioner was neither a party nor in privity with a party, this petition should be granted and the judgment reversed.

2. Review should be granted of the patently erroneous

evidence rulings of the trial court, because they were ignored completely by the Court of Appeals.

Citation of authorities (pp. 18-20) dealing with two serious, exhaustive reviews by courts below of legal and factual contentions thus misses the mark. Because of the court's attitude toward Hubbard, Hacienda has yet to have serious appellate review of its contentions seriously urged in the Court of Appeals.

Citations of authority (pp. 18-19) suggesting unlimited discretion on the part of the trial court to grant new trials also misses the mark because such discretion is itself a limit on the constitutional right of trial by jury. The constitutional right of jury trial and the court's discretion to set aside a jury's verdict are thus in fundamental collision, as has been recently recognized in a growing number of decisions setting aside such orders. (See Petition, p. 39) *Duncan* v. *Duncan,* 377 F. 2d 49 (C. A. 6, 1967); *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*; 346 F. 2d 532 (2d Cir. 1965), *cert. denied,* 382 U. S. 983, 86 S. Ct. 559, 15 L. Ed. 2d 472 (1966); *Lind* v. *Schenley Industries, Inc.,* 278 F. 2d 79 (3d Cir.) (*En banc*) (1960), *cert. denied,* 364 U. S. 835, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960) and *Fassbinder* v. *Pennsylvania R. R. Co.,* 322 F. 2d 859 (3rd Cir. 1963) (*En banc*).

Review of the evidentiary rulings should be included in any grant of review, because they are simple, central to the case, and enable a complete disposition. The *Tracy* and *Carpenter* evidence was admissible under three well-established exceptions to the hearsay rule, each of which is established by important state and federal authority, including decisions of this Court. (See pp. 36-39)

Under Rule 43 of F. R. C. P. federal district courts are required to receive any evidence admissible under either federal or state rules of evidence. Review should be granted, in the exercise of this Court's supervisory jurisdiction, to prevent that broad rule of admissibility from becoming a nullity.

The attempted treatment of the evidence rejections as simply matters of discretion ignores that rule 43, is a broad rule of admission, not rejection. *U. S.* v. *Featherstone* (C. A. 10, 1963), 325 F. 2d 540, 542; *Rain* v. *Pavkov* (C. A. 3, 1966), 357 F. 2d 506, 509-510; 5 Moore's Federal Practice, § 43.04, p. 1327.

Review of the rejected evidence of Tracy and Carpenter leaves little doubt that Carl Kiefel was dismissed as a party to the suit on the very day the trial started, solely to prevent his damaging admissions to Carpenter and Tracy. (See Petition, pp. 9-12)

Respondent errs (p. 22) in stating we did not urge our three theories in the trial court. We even wrote a brief. (A. II 10-18)

It is of no moment that Kiefel's hearsay declarations were out of plaintiff's presence. (Brief, p. 19) All hearsay, whether admissible under an exclusion or not, is necessarily out of the presence of the opposing party, simply by definition. Otherwise, it would be an admission.

Carpenter:

The suggestion (p. 22) that Carpenter's evidence of Kiefel's declaration that he told his wife to leave the door open is uncorroborated by any evidence that she acquiesced in the plan is a bold misstatement of the record. After the accident she admitted to five different people, on three separate occasions that she had left the door open. (See p. 3, *supra*) Her admissions were established not only

by direct testimony, but by contemporaneous hospital and police records admitted in evidence. (A. I 601-602, 494, 539, 599; A. II 811, 807, 635, 794, 827, 808-809)

There can be no doubt Donna Kiefel acquiesced in her husband's request to leave the door open. In fact, according to Officer Wightman's report, it was one of the first things Carl Kiefel asked his wife when he first conversed with her at the hospital. "Did you leave the door unlocked?" Plaintiff replied: "I think so." (A. II 811; A. I 601-602)

Dixie Tracy:

Respondent is in error (p. 20) that an offer of proof was required at the first trial. The court's ruling re Carpenter that he would exclude any declaration of Carl Kiefel out of Plaintiff's presence precluded the necessity of such an offer. (See pp. 3, 19, *supra*) (A. I 558-559)

Tracy's evidence was offered substantively, rather than as impeachment. Thus, it was unnecessary (Brief, p. 10) at the second trial to lay a foundation by first interrogating the missing Carl Kiefel* about the conversation.

Nor is it relevant (p. 21) that Carpenter's and Tracy's testimony did not describe Kiefel's clothing identically. They did not view him at the same time. Assuming he did not change clothing, this discrepancy was for the jury, not the court, to weigh.

There is no error in the statement (Petition, p. 38) that Kiefel did not render assistance to his wife. The Prolle testimony was explicit:

> "Q. Was he attending her and giving her first aid? A. None, whatsoever." (A. 291; A. II 639-640)

---

* Kiefel disappeared after a divorce between trials. (A. II 85-86)

Nor did he accompany her to the hospital, according to Dr. Gardner, the receiving physician. (A. 457; A. II 374-375)

Respondent's claim (p. 38) that the court's evidence rulings were in an area of discretion (Brief, p. 24) concedes it would not have been error to admit the Tracy and Carpenter evidence. If so, there was no impropriety on Hubbard's part in stating the substance of Tracy's testimony in his opening statement, in view of the admitted fact (Add. A. 100) Hubbard had brought her all the way from Las Vegas to testify and had her in the witness room of the federal courthouse.

The Tracy and Carpenter evidence was central to the entire case. Its exclusion was erroneous and seriously prejudiced petitioner Hacienda in both trials. That exclusion should be reviewed.

CONCLUSION.

For the foregoing reasons and for the reasons stated in the Petition, the petition of Hubbard, the trial lawyer, should be granted and the judgment against him vacated, because the entire "costs" proceeding is without valid precedent and is in fundamental conflict with the statute designed to protect the independence of trial lawyers to represent their clients.

Alternatively, Hubbard prays that certiorari be granted and

1. the award of expert witness fees be vacated, and
2. the remand for assessment against Hubbard of opposing counsel's fees on appeal be vacated, or
3. that the matter be remanded to the district court for a proper evidentiary hearing.

Las Vegas Hacienda prays that certiorari be granted and that the original judgment in its favor be reinstated, or that a new trial be granted.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

JUN 12 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1235

REESE HUBBARD AND LAS VEGAS HACIENDA, INC.,

Petitioners,

vs.

DONNA M. KIEFEL,

Respondent.

PETITION OF REESE HUBBARD FOR REHEARING.

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DONNA M. KIEFEL,

Respondent.

PETITION OF REESE HUBBARD FOR REHEARING.

Reese Hubbard, a trial lawyer, prays that this Court grant rehearing of its order of May 19, 1969, denying the writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case as prayed for in the petition filed April 7, 1969.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

Rehearing should be granted because the decision below is completely inconsistent with this Court's newly decided [April 22, 1969] case of *Frazier* v. *Cupp*, 37 U. S. Law Week 4362-4364, 89 S. Ct. 1420, 22 L. Ed. 2d 684-694. [Re-

printed below in Appendix] There defendant, Frazier, was indicted jointly with his cousin Rawls, who pleaded guilty. The prosecutor, thinking Rawls would give State's evidence, stated the substance of that evidence in the opening statement. Before trial defense counsel had told the prosecutor that Rawls would take the Fifth Amendment. Further, an immediate motion for mistrial was made. Nonetheless, this Court held there was no "prosecutorial misconduct" warranting reversal in respect of the opening statement. Stated this Court realistically (37 U. S. Law Week 4263, 89 S. Ct. 1422):

> "* * * [H]ere we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given. Even if it is unreasonable to assume that a jury can disregard a co-conspirator's statement when introduced against one of two joint defendants, **it does not seem at all remarkable to assume that the jury will ordinarily be able to limit its consideration to the evidence introduced during the trial.** * * *" (Emphasis supplied.) *Infra,* at pp. 10-11.

The principal charge of "objectionable trial strategy" on which Hubbard is to be assessed a massive award of costs and attorney's fees on appeal is that he made what the trial court later characterized as an "inflammatory opening statement." (A. 36, 37, 38-39.) That opening statement was never objected to by opposing counsel. All that was wrong with it was simply that Hubbard stated the testimony of a witness (Tracy) whom he could not later

put on as a witness.* All other matters in the opening statement were proved. (A. 192, 257, 539, 561)

But it is uncontradicted that Hubbard had brought Tracy all the way from Las Vegas to testify and had her in the witness room of the federal courthouse. (Add. A. 100) He failed to present her only because of an adverse, erroneous evidentiary ruling of the court. (A. 558-559; A. 45; Petition, pp. 11-12) The jury was properly directed to ignore any matter not shown by the evidence. (A. 79)

If what this Court stated in *Frazier* is correct, this petition should be granted and the judgment below reversed. Hubbard should not be subjected to a massive award of costs and attorney's fees on appeal because of a claimed defect in an opening statement which was never objected to during trial and is indistinguishable from that of the prosecutor in *Frazier.*

The decision below, if left to stand, threatens serious impairment of the independence of the bar. No attorney can feel free to state in an opening statement the evidence he expects to prove, if he knows that a variance resulting from an adverse evidentiary ruling or otherwise may impoverish him by a summary award of costs and attorney's fees** for "objectionable trial strategy."

Frazier v. *Cupp* disposes of the only matter which could be decided on the verity of the trial court's own observations. Resolution of the trial court's remaining charges of "objectionable trial strategy" would turn on evidence of events which took place outside the "actual presence" of the court. (See Reply Brief, pp. 2, 12)

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* "The evidence will show that during that evening the husband [Carl Kiefel] was making repeated telephone calls to the room, and that the husband told the telephone operator [Tracy] that he and his wife [plaintiff] had had a fight, and that she wouldn't let him in the room." (A. 81.)

** The instant award against this trial lawyer includes $1,741.20 of trial costs, $1,959.70 of printing fees on appeal (Petition, p. 33) and one-third of all plaintiff's attorneys' fees on appeal.

The proper constitutional way to resolve these factual issues was by an evidentiary hearing at which Hubbard and his accuser [Jacobson] and their respective corroborating witnesses might be examined and cross-examined. *Willner* v. *Committee on Character & Fitness,* 373 U. S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963); *Re Oliver,* 333 U. S. 257, 92 L. Ed. 682, 68 S. Ct. 499. See Petition, pp. 21-26.

Indeed, on Monday of this week [June 9, 1969] this Court struck down a Wisconsin statute which permitted garnishment of a man's wages without first requiring evidentiary proof of the debt. *Sniadach* v. *Family Finance* (No. 130).* What the holding makes clear is that the constitutional requirements are the same, whether the proceeding be called tort, contract, garnishment, or, as here, "costs and attorneys' fees" for "objectionable trial strategy."

But, the only "evidentiary hearing" ever permitted Hubbard on the amount to be summarily assessed against him. (A. 629)

Hubbard has practiced law with distinction in Chicago for nearly 35 years, since his graduation from the Harvard Law School. Martindale-Hubbell rates him "a. v." (2 Martindale-Hubbell Law Directory [1969 ed.], p. 77)

More than thirteen jurists of the state and federal bench, before whom Hubbard has tried more than 200 cases in the last 20 years have vouched unqualifiedly for his exemplary conduct as a trial lawyer. (A. 125-127)

The independence of the bar will be irreparably threatened if such a trial lawyer should be summarily punished for "objectionable trial strategy" without an "evidentiary

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* We are unable to include the opinion in the Appendix because our only reference is to the New York Times' article thereon. New York Times (June 10, 1969), pp. 1, 29, 60.

hearing," at which he might confront and cross-examine his accusers and present supporting evidence.

Respectfully submitted,

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Attorneys for Petitioner,
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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

.....

Counsel for Petitioner.

APPENDIX.

Conflicting Opinion:

Frazier v. *Cupp*, ... U. S. ....., 89 S. Ct. 1420, 22 L. Ed. 2d 684-694 (April 22, 1969).

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner was convicted in an Oregon state court of second-degree murder in connection with the September 22, 1964, slaying of one Russell Anton Marleau. After the Supreme Court of Oregon had affirmed his conviction, 245 Or. 4, 418 P. 2d 841 (1966), petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Oregon. The District Court granted the writ, but the Ninth Circuit Court of Appeals reversed, 388 F. 2d 777 (1968). We granted certiorari to consider three contentions of error raised by petitioner, 393 U. S. 821, 89 S. Ct. 222, 21 L. Ed. 2d 93 (1968). Although petitioner's case has been ably briefed and argued by appointed counsel, we find none of these allegations sufficient to warrant reversal.

I.

Petitioner's first argument centers on certain allegedly prejudicial remarks made during the prosecutor's opening statement. Petitioner had been indicted jointly with his cousin, Jerry Lee Rawls, who pleaded guilty to the same offense. Prior to petitioner's trial, petitioner's defense counsel told the prosecutor that Rawls would invoke his privilege against self-incrimination if he were called to the stand; defense counsel warned the prosecutor not to rely in his opening statement upon Rawls' expected testimony. The prosecutor replied that he would act on the basis of

"all of the information I have concerning [Rawls'] testimony." Before trial, he consulted with a police officer who had spoken to Rawls and with Rawls' probation officer; each indicated his belief that Rawls would testify. Similar information came, through a sheriff's report, from some of Rawls' close relatives. Because of these reports, the prosecutor concluded that Rawls would testify if asked to do so. The court below felt that the prosecutor also relied on the fact that Rawls had pleaded guilty and was awaiting sentence. This would give him reason, the court felt, to cooperate with the prosecutor.

In any case, after the trial began the prosecutor included in his opening statement a summary of the testimony he expected to receive from Rawls. The summary was not emphasized in any particular way; it took only a few minutes to recite and was sandwiched between a summary of petitioner's own confession and a description of the circumstantial evidence the State would introduce. At one point the prosecutor referred to a paper he was holding in his hands to refresh his memory about something Rawls had said. Although the State admitted in argument here that the jury might fairly have believed that the prosecutor was referring to Rawls' statement, he did not explicitly tell the jury that this paper was Rawls' confession, nor did he purport to read directly from it. A motion for a mistrial was made at the close of the opening statement, but it was denied. Later, the prosecutor called Rawls to the stand. Rawls informed the court that he intended to assert his privilege against self-incrimination in regard to every question concerning his activities on the morning of September 22, 1964. The matter was not further pursued, and Rawls was dismissed from the stand. His appearance could not have lasted more than two or three minutes. The motion for mistrial was renewed and once again denied.

[1] Petitioner argues that this series of events placed

the substance of Rawls' statement before the jury in a way that "may well have been the equivalent in the jury's mind of testimony," *Douglas* v. *Alabama,* 380 U. S. 415, 419, 85 S. Ct. 1074, 1077, 13 L. Ed. 2d 934 (1965), and that, as in *Bruton* v. *United States,* 391 U. S. 123, 128, 88 S. Ct. 1620, 1623, 20 L. Ed. 2d 476 (1968), the statement "added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination * * *." In this way, petitioner claims he was denied his constitutional right of confrontation, guaranteed by the Sixth and Fourteenth Amendments to the Constitution. See *Pointer* v. *Texas,* 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). Although the judge did caution the jurors that they "must not regard any statement made by counsel in your presence during the proceedings concerning the facts of this case as evidence," petitioner contends that *Bruton* v. *United States, supra,* disposes of the contention that limiting instructions of this sort can be relied upon to cure the error which occurred. Although the question thus posed is not an easy one, we cannot agree with petitioner's conclusion.

First of all, it is clear that this case is quite different from either *Douglas* or *Bruton.* In *Douglas,* the prosecutor called the defendant's co-conspirator to the stand and read his alleged confession to him; the co-conspirator was required to assert his privilege against self-incrimination repeatedly as the prosecutor asked him to confirm or deny each statement. The Court found that this procedure placed powerfully incriminating evidence before the jury in a manner which effectively denied the right of cross-examination. Here, Rawls was on the stand for a very short time and only a paraphrase of the statement was placed before the jury. This was done not during the trial, while the person making the statement was on the stand, but in an opening statement. In addition, the jury was told that the

opening statement should not be considered as evidence. Certainly the impact of the procedure used here was much less damaging than was the case in *Douglas*. And unlike the situation in *Bruton*, the jury was not being asked to perform the mental gymnastics of considering an incriminating statement against only one of two defendants in a joint trial. Moreover, unlike the situation in either *Douglas* or *Bruton*, Rawls' statement was not a vitally important part of the prosecution's case.

[2-4] We believe that in these circumstances the limiting instructions given were sufficient to protect petitioner's constitutional rights.* As the Court said in *Bruton*, 391 U. S. at 135, 88 S. Ct. at 1627, "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." See *Hopt* v. *Utah*, 120 U. S. 430, 438, 7 S. Ct. 614, 30 L. Ed. 708 (1887). It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable. But here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given. Even if it is unreasonable to assume that a jury can disregard a co-conspirator's statement when introduced against one of two joint defendants, it does not seem at all remarkable to assume that the jury will ordinarily be able to limit its considera-

*A more specific limiting instruction might have been desirable, but none was requested.

tion to the evidence introduced during the trial. At least where the anticipated, and unproduced, evidence is not touted to the jury as a crucial part of the prosecution's case, "it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239, 60 S. Ct. 811, 852, 84 L. Ed. 1129 (1940).

[5] The Court of Appeals seemed to feel that this aspect of the case turned on whether or not the prosecutor acted "in a good faith expectation that Rawls would testify." 388 F. 2d at 780-781. While we do not believe that the prosecutor's good faith, or lack of it, is controlling in determining whether a defendant has been deprived of the right of confrontation guaranteed by the Sixth and Fourteenth Amendments, we agree with the Court of Appeals' factual determination in this case. The evidence presented in the record is sufficient to support the Oregon Supreme Court's conclusion that "the state could reasonably expect [Rawls] to testify in line with his previous statements." 245 Or. at 9, 418 P. 2d at 843. Accordingly, there is no need to decide whether the type of prosecutorial misconduct alleged to have occurred would have been sufficient to constitute reversible constitutional error. *Cf. Miller* v. *Pate*, 386 U. S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967). Therefore, because we find neither prosecutorial misconduct nor a deprivation of the right of confrontation, we agree with the Court of Appeals that nothing which occurred during the prosecution's opening statement would warrant federal habeas relief.

II.

Petitioner's second argument concerns the admission into evidence of his own confession. The circumstances under which the confession was obtained can be summarized briefly. Petitioner was arrested about 4:15 p. m. on September 24, 1964. He was taken to headquarters where questioning began at about 5 p.m. The interrogation, which was tape recorded, ended slightly more than an hour later, and by 6:45 p.m. petitioner had signed a written version of his confession.

After the questioning had begun and after a few routine facts were ascertained, petitioner was questioned briefly about the location of his Marine uniform. He was next asked where he was on the night in question. Although he admitted that he was with his cousin Rawls, he denied being with any third person. Then petitioner was given a somewhat abbreviated description of his constitutional rights. He was told that he could have an attorney if he wanted one and that anything he said could be used against him at trial. Questioning thereafter became somewhat more vigorous, but petitioner continued to deny being with anyone but Rawls. At this point, the officer questioning petitioner told him, falsely, that Rawls had been brought in and that he had confessed. Petitioner still was reluctant to talk, but after the officer sympathetically suggested that the victim had started a fight by making homosexual advances, petitioner began to spill out his story. Shortly after he began he again showed signs of reluctance and said, "I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now." The officer replied simply, "You can't be in any more trouble than you are in now," and the questioning session proceeded. A full confession was obtained and, after further warnings, a written version was signed.

[6, 7] Since petitioner was tried after this Court's decision in *Escobedo* v. *Illinois,* 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), but before the decision in *Miranda* v. *Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974 (1966), only the rule of the former case is directly applicable. *Johnson* v. *New Jersey,* 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966). Petitioner argues that his statement about getting a lawyer was sufficient to bring *Escobedo* into play and that the police should immediately have stopped the questioning and obtained counsel for him. We might agree were *Miranda* applicable to this case, for in *Miranda* this Court held that "[i]f • • • [a suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U. S. at 444-445, 86 S. Ct. at 1612. But *Miranda* does not apply to this case. This Court in *Johnson* v. *New Jersey* pointedly rejected the contention that the specific commands of *Miranda* should apply to all post-*Escobedo* cases. The Court recognized "[t]he disagreements among other courts concerning the implications of *Escobedo,*" *Johnson* v. *New Jersey, supra,* 384 U. S. at 734-735, 86 S. Ct. at 1781, and concluded that the States, although free to apply *Miranda* to post-*Escobedo* cases, *id.,* at 733, 86 S. Ct. 1772, were not required to do so. The Oregon Supreme Court, in affirming petitioner's conviction, concluded that the confession was properly introduced into evidence. Under *Johnson,* we would be free to disagree with this conclusion only if we felt compelled to do so by the specific holding of *Escobedo.*

[8] We do not believe that *Escobedo* covers this case. Petitioner's statement about seeing an attorney was neither as clear nor as unambiguous as the request Escobedo made. The police in *Escobedo* were unmistakably informed of their suspect's wishes; in fact Escobedo's attorney was present and repeatedly requested permission to see his

client. Here, on the other hand, it is possible that the questioning officer took petitioner's remark not as a request that the interrogation cease but merely as a passing comment. Petitioner did not pursue the matter, but continued answering questions. In this context, we cannot find the denial of the right to counsel which was found so crucial in *Escobedo.*

[9-11] Petitioner also presses the alternative argument that his confession was involuntary and that it should have been excluded for that reason. The trial judge, after an evidentiary hearing during which the tape recording was played, could not agree with this contention, and our reading of the record does not lead us to a contrary conclusion. Before petitioner made any incriminating statements, he received partial warnings of his constitutional rights; this is, of course, a circumstance quite relevant to a finding of voluntariness. *Davis* v. *North Carolina,* 384 U. S. 737, 740-741, 86 S. Ct. 1761; 16 L. Ed. 2d 895 (1966). The questioning was of short duration, and petitioner was a mature individual of normal intelligence. The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the "totality of the circumstances," see *e.g., Clewis* v. *Texas,* 386 U. S. 707, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967), and on the facts of this case we can find no error in the admission of petitioner's confession.

III.

[12] Petitioner's final contention can be dismissed rather quickly. He argues that the trial judge erred in permitting some clothing seized from petitioner's duffel bag to be introduced into evidence. This duffel bag was being used jointly by petitioner and his cousin Rawls and

it had been left in Rawls' home. The police, while arresting Rawls, asked him if they could have his clothing. They were directed to the duffel bag and both Rawls and his mother consented to its search. During this search, the officers came upon petitioner's clothing and it was seized as well. Since Rawls was a joint user of the bag, he clearly had authority to consent to its search. The officers therefore found evidence against petitioner while in the course of an otherwise lawful search. Under this Court's past decisions, they were clearly permitted to seize it. *Harris* v. *United States,* 390 U. S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968); *Warden, Maryland Penitentiary* v. *Hayden,* 387 U. S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967). Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside. We find no valid search and seizure claim in this case.

Because we find none of petitioner's contentions meritorious, we affirm the judgment of the Court of Appeals.

Affirmed.

Mr. Chief Justice WARREN and Mr. Justice DOUGLAS concur in the result.

Mr. Justice FORTAS took no part in the consideration or decision of this case.

See also *Sniadack* v. *Family Finance,* No. 130 [June 9, 1969], referred to at p. 4, *supra.*